OAH Docket No. 12-3300-20315-1
Governor's Tracking No. AR 458

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF WATER AND SOIL RESOURCES

In the Matter of the Proposed Amendments to the Rules of the Board of Water and Soil Resources Relating to the Wetland Conservation Act, Minnesota Rules Chapter 8420	**REPORT OF THE ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Steve M. Mihalchick conducted hearings concerning the proposed amendments to rules relating to the Wetland Conservation Act. On April 30, 2009, hearings were held at the Blandin Foundation, 100 Pokegama Avenue, Grand Rapids, Minnesota beginning at 1:00 p.m. and resuming at 6:00 p.m. On May 1, 2009, hearings were held at the Youngquist Auditorium of the University of Minnesota-Crookston, 2900 University Avenue, Crookston, Minnesota beginning at 1:00 p.m. and resuming at 6:00 p.m. On May 4, 2009, hearings were held at the Kandi Entertainment Center, 500 19th Avenue S.E., Willmar, Minnesota beginning at 1:00 p.m. and resuming at 6:00 p.m. On May 5, 2009, the hearings concluded with afternoon and evening sessions at the Minnesota Board of Water and Soil Resources Board Room, 520 Lafayette Road North, Saint Paul, Minnesota. The hearings at each location continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The Legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Board of Water and Soil Resources (Board or BWSR).

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[1] Minn. Stat. §§ 14.131 through 14.20 (2008).

David Weirens, Land and Water Section Manager, Les Lemm, Wetland Conservation Act Coordinator, and Ken Powell, Metro Region Senior Wetlands Specialist, appeared at the rule hearings on behalf of the Board. Fourteen members of the public signed the hearing register at Grand Rapids, three at Crookston, twelve at Willmar, and fifteen at Saint Paul.

The Board received written comments on the proposed rules before the hearing. After the hearing, the record remained open until May 12, 2009, to allow interested persons and the Board an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Board the opportunity to file a written response to the comments submitted. The OAH hearing record closed on May 19, 2009. All of the comments received were read and considered. The comments were also posted on the OAH website for the benefit of all participants.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. The Board is the responsible administrative agency for Minnesota's 91 soil and water conservation districts, 45 watershed districts, 18 metropolitan watershed management organizations, and 80 county water managers. The Board describes its purpose as protecting and enhancing Minnesota's soil and water resources "by implementing the state's soil and water conservation policy, comprehensive local water management, and the Wetland Conservation Act as it relates to the 41.7 million acres of private land in Minnesota."[2] These responsibilities are carried out through the actions of local governments. BWSR is governed by a Board consisting of 17 members, including local government representatives, state agencies, and citizens.

2. In 1991, the Wetland Conservation Act (WCA) was enacted.[3] The WCA is intended to maintain and protect Minnesota's wetlands and thereby enhance the benefits that wetlands provide to the environment. The WCA is implemented locally by cities, counties, watershed management organizations, soil and water conservation districts (SWCD), and townships (collectively local governmental units or LGUs). The Minnesota Department of Natural Resources (DNR) Conservation Officers and other licensed peace officers enforce the statute. BWSR administers the WCA statewide.

3. The WCA requires anyone proposing to drain, fill, or excavate a wetland first to try to avoid disturbing the wetland; second, to try to minimize any impact on the wetland; and, finally, to replace any lost wetland acres, function, and value. Certain wetland activities are exempt from the WCA, allowing projects with minimal impact or projects located on land where certain preestablished land uses are present to proceed

[2] Statement of Need and Reasonableness (SONAR), at 2.
[3] Laws of Minnesota 1991, Chapter 354.

without regulation. The Legislature has amended WCA many times since 1991, most recently in 2007 and 2008.[4]

4. The 2007 amendment to the WCA, codified at Laws of Minnesota 2007, Chapter 57, Section 166, states:

> Within 90 days of the effective date of this section, the Board of Water and Soil Resources shall adopt rules that amend Minnesota Rules, chapter 8420, to incorporate statute changes and to address the related wetland exemption provisions in Minnesota Rules, parts 8420.0115 to 8420.0210, and the wetland replacement and banking provisions in Minnesota Rules, parts 8420.0500 to 8420.0760. These rules are exempt from the rulemaking provisions of Minnesota Statutes, chapter 14, except that Minnesota Statutes, section 14.386, applies and the proposed rules must be submitted to the senate and house committees having jurisdiction over environment and natural resources at least 30 days prior to being published in the State Register. The amended rules are effective for two years from the date of publication in the State Register unless they are superseded by permanent rules.

5. The exempt rules authorized by the Legislature were published on August 5, 2007. The permanent WCA rule process was begun by publishing a request for comments on this same date.[5]

6. In developing the proposed permanent rules, the BWSR staff held a series of meetings with stakeholder organizations in 2007 to discuss the rulemaking process and related issues. The Board formed a Permanent Rule Advisory Committee and a Technical Advisory Committee. Membership on these committees included representatives from organizations in the areas of agriculture; business, environment/conservation; local government, state and federal government, and technical/professional organizations. These advisory committees held meetings beginning in January 2008 to review rule issues and proposed language.[6]

Rulemaking Legal Standards

7. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely upon legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely upon interpretation of a statute, or stated policy preferences.[7] The Board prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative

[4] SONAR, at 2.
[5] SONAR, at 2.
[6] SONAR, at 4.
[7] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Board representatives at the public hearing and in written post-hearing submissions.

8. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[8] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[9] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[10]

9. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[11] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[12]

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[13]

11. At the hearings in this matter, the Board proposed several revisions to the proposed rule language after the proposed rules were published in the *State Register*.[14] The Administrative Law Judge must determine if new language, either proposed by the Board or suggested to correct defects, is substantially different from that which was originally proposed.[15]

Procedural Requirements of Chapter 14

12. On August 6, 2007, the Board published a Request for Comments on the proposed rules. The Request for Comments was published at 32 *State Register* 304.[16]

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[8] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[9] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[10] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[11] *Manufactured Housing Institute*, 347 N.W.2d at 244.
[12] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[13] Minn. R. 1400.2100.
[14] Ex. M.
[15] Minn. Stat. § 14.15, subd. 3 (2008).
[16] Ex. A.

13. By letter dated March 13, 2009, the Board requested that the Office of Administrative Hearings schedule a hearing on the proposed rules and assign an Administrative Law Judge. Along with the letter, the Board filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). The Board also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan. The Board described its notice plan as follows:

> BWSR intends to send a copy of the Public Hearing Notice to:
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> - All individuals who have registered with BWSR for the purpose of receiving notice of rule proceedings as required by Minn. Stat. 14.14, subd. 1a;
> - All organizations that have participated in the stakeholder advisory committee (see list of organizations above);
> - All WCA local government units, all soil and water conservation districts, all watershed districts, and all local water planners;
> - All individuals and representatives of associations that BWSR has on file as interested and affected parties;
> - Minn. Stat. 14.116 requires a copy of the notice, the rules, and SONAR be sent to the chairs and ranking minority members of the committees with jurisdiction over the subject matter of the proposed rules. This statute also states that if the mailing of the notice is within two years of the effective date of the law granting rulemaking authority that the agency must make reasonable efforts to send a copy of the notice and SONAR to all sitting legislators who were chief authors of the bill granting the rulemaking authority. Under this statutory directive the following legislators will be sent the above referenced documents: the chairs and ranking minority members of (1) the House Environment and Natural Resources Policy Committee; (2) the House Environment and Natural Resources Finance Committee; (3) the Senate Environment and Natural Resources Committee; (4) Environment, Energy and Natural Resources Budget Division; and chief authors of WCA legislation in 2007 and 2008: Rep. Rick Hanson; Rep. Tom Anzelc; Sen. Satveer Chaudhary; and Sen. Tom Saxhaug.
> - In addition, a copy of the notice, proposed rule and draft SONAR will be posted on the BWSR website.[17]

14. Administrative Law Judge Steve M. Mihalchick was assigned to the rule hearing. In a letter dated March 18, 2009, Judge Mihalchick approved the Board's Notice of Hearing and Additional Notice Plan.

15. On March 25 and 26, 2009, the Board mailed copies of the Notice of Hearing, proposed rules, and SONAR to the chairs, chief authors, and ranking minority members of designated legislative committees.[18]

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[17] Ex. D, at 11 (hereinafter SONAR).

16. On March 26, 2009, the Board mailed a copy of the SONAR to the Legislative Reference Library as required by law.[19]

17. On March 25 and 26, 2009, the Board mailed a copy of the Notice Hearing to all persons and associations who had registered their names with the Department for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.[20]

18. On March 30, 2009, a copy of the Dual Notice was published in the *State Register* at 33 S.R. 1641.[21]

19. On the first day of the hearings in this matter, the Board placed the following documents in the record:

- The Request for Comments on Planned Amendments to Rules Governing Wetland Conservation, published August 6, 2007, at 32 SR 304. (Ex. A);
- A copy of the proposed rules with Revisor's approval dated March 16, 2009 (Ex. C);
- A copy of the SONAR (Ex. D);
- Certificate of Mailing the SONAR to the Legislative Reference Library, with cover letter dated March 26, 2009 (Ex. E);
- A copy of the Notice of Hearing as published in 33 S.R. 1641 (Ex. F);
- Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on March 25, 2009 and Certificate of Accuracy of the Mailing List, with mailing list (Ex. G);
- Certificate of Additional Notice (Ex. H);
- Written public comments received during the public comment period (Ex. I);
- Written public comments received after the public comment period ended (Exs. 90-95);
- Other documents to show compliance with any other law or rule which the Agency is required to follow (Ex. K);
- A summary of the rulemaking distributed to the public (Ex. L);
- Errata to the proposed rules distributed to the public (Ex. M);
- A paper copy of the electronic presentation made at the hearings in this matter (Ex. N); and
- A concordance between the citations to rule parts as developed and citations adjusted by the Revisor of Statutes (Ex. O).

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[18] Ex. H. *See* Minn. Stat. § 14.116.
[19] Ex. E.
[20] Ex. H.
[21] Ex. F.

20. Written comments received during the hearing (Public Exs. 1-9), comments received during the posthearing comment periods, and the Board's responses were placed in the record.

Additional Notice

21. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Board's efforts to provide additional notice to persons who may be affected by the proposed rules. The Board submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated March 18, 2009. In addition to notifying those persons on the Department's rulemaking mailing list for Wetland Conservation Act rules, the Board represented that it would mail a Notice of Hearing to over 500 persons, organizations, and government entities that have an interest in these rules. The Board held eight stakeholder meetings (described as local government listening sessions) at locations throughout the state. Three rule development meetings involving environmental, business, and governmental associations were held in November, 2007. In arriving at the specific rule language, the Board relied on a Technical Advisory Committee, comprised primarily of government representatives, and the WCA Permanent Rule Advisory Committee (WCA Permanent Committee), comprised a wide range of stakeholders. The WCA Permanent Committee had thirty-five members, representing the areas of agriculture, business, environment/conservation, local, state, and federal government, and professionals involved in wetland issues. Both the Technical Advisory Committee and the WCA Permanent Committee each met eleven times regarding these proposed rules. Other interested groups were invited to attend and participate.[22]

22. Throughout the development of the proposed rule, the Board provided draft rule language, advisory committee meeting notes, rule process information, and supporting information on the agency's website. When available, the Board posted a copy of the proposed rules, SONAR, and the Dual Notice of this proceeding on the agency website.[23]

23. The Administrative Law Judge finds that the Board fulfilled its additional notice requirement.

Statutory Authorization

24. In its SONAR, the Board cited as general authority to develop the proposed permanent rules: Minn. Stat. §§ 103B.101, 103B.3355, and 103G.2242. The Board cited Laws of Minnesota 2007, Chapter 57, Section 166, as specific authority for this rulemaking.[24]

25. Under Minn. Stat. § 103B.101, subd. 7, the Board is authorized to "hold public hearings and adopt rules necessary to execute its duties." The Board's statutory rulemaking authority as set out in Minn. Stat. § 103B.3355 is as follows:

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[22] SONAR at 9-10.
[23] SONAR at 11.
[24] Sonar Errata, May 12, 2009.

(b) The Board of Water and Soil Resources, in consultation with the commissioners of natural resources and agriculture and local government units, shall adopt rules establishing:

(1) scientific methodologies for determining the functions of wetlands; and

(2) criteria for determining the resulting public values of wetlands.

26. The authority cited by the Board in Minn. Stat. § 103G.2242, subd. 1, also relates to wetland replacement valuation and states:

> Subdivision 1. Rules. (a) The board, in consultation with the commissioner, shall adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands under section 103G.245. These rules must address the criteria, procedure, timing, and location of acceptable replacement of wetland values; may address the state establishment and administration of a wetland banking program for public and private projects, which may include provisions allowing monetary payment to the wetland banking program for alteration of wetlands on agricultural land; the administrative, monitoring, and enforcement procedures to be used; and a procedure for the review and appeal of decisions under this section. In the case of peatlands, the replacement plan rules must consider the impact on carbon balance described in the report required by Laws 1990, chapter 587, and include the planting of trees or shrubs.

27. The Administrative Law Judge finds that the Board has the statutory authority to adopt rules in these subject areas. Whether the proposed rules are consistent with the statute is addressed in the part-by-part analysis below.

Regulatory Analysis in the SONAR

28. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Board identified present and future landowners of property containing wetlands and local governments as the classes of persons who will be affected by the proposed rule. The Board noted that "the current rule imposes costs that are primarily borne by the affected landowners, taxpayers supporting local government operations, and state taxpayers who support state grants to local government and the state operations required to oversee the program." To the extent that the proposed rule amendments result in changes in costs, the Board indicated that these will affect the same classes of persons. Regarding the amount of these costs, the Board stated:

> However, this rule proposes to reduce inconsistency with federal regulations. This improved coordination should result in direct benefits to local governments and landowners through reduced delays in project approvals, reduced costs in program administration, and reduced cost in complying with state and federal regulatory requirements. Beneficiaries of the rule will be the general citizenry who realize the environmental benefits of wetland protection (water quality, flood control, fish and wildlife habitat, etc.) benefit from and bear the cost of the proposed rule.[25]

The Board identified beneficiaries of the proposed rule amendments as "the general citizenry who realize the environmental benefits of wetland protection (water quality, flood control, fish and wildlife habitat, etc.)."[26]

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Board estimated that the state agencies which will be most affected by the rule are BWSR, followed by the DNR, the Minnesota Department of Transportation (MnDOT), the Minnesota Pollution Control Agency (PCA), and the Minnesota Department of Agriculture. The Board noted that under the existing rule, dedicated appropriations to these agencies exist for implementation costs. The Board concluded that the impacts on these agencies will likely be unchanged by the proposed rule adoption. The Board concluded that the effect on state revenues was negligible as compared to the current rule.[27]

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Board indicated that there is no known alternative to the proposed rule that would be less costly or less intrusive. The Board noted that the existing rule and the proposed rule amendments are required by and necessary to implement a statute. During the development of the proposed rule, BWSR staff and stakeholders discussed numerous ideas for accomplishing the purpose of the statute. The Board noted that many of these ideas were incorporated into the proposed rule to provide a means to achieve statutory compliance in an efficient and effective manner.[28]

[25] SONAR at 5.
[26] SONAR at 5.
[27] SONAR at 5.
[28] SONAR at 6.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

In meeting its obligation to consider less costly or intrusive methods, the Board noted that it developed the rules "as the fundamental comprehensive document used to understand and administer WCA."[29] The Board noted that:

> It would be possible to develop a slightly smaller rule (fewer pages) if all statute language were omitted and the rules only addressed program elements that required further elaboration or specificity. However, the confusion it would cause among local governments implementing the program and the regulated public affected by this action would quickly outweigh any initial savings in printing costs.[30]

The Board noted that its exempt rule incorporated most of the statutory changes enacted in 2007. Since that rule was adopted, BWSR has received comments and suggestions from interest group representatives to improve the application and effectiveness of the rules by local governments. This interaction with local governments and interested parties will, in the Board's opinion, ensure that these changes will have positive effects on the proposed permanent rule.[31]

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

In its SONAR, the Board described the probable costs of compliance with the proposed rules as "difficult to determine but it is likely that these costs will be relatively unchanged from current levels." The Board forecast increased costs of compliance with the permanent rules due to the statutory changes intended to reduce wetland losses and the improved wetland replacement standards that have been incorporated into the proposed permanent rule. The Board also anticipated a decrease in some costs as the rule streamlines administrative requirements and improves consistency with federal regulations. The proposed permanent rule changes in these areas will reduce costs for local governments and landowners.[32]

The Red River Water Management Board (RRWMB) asserted that the Board had failed to adequately identify the total costs to LGUs imposed by a reporting requirement, stating:

> This provision requires the reporting of information by the local units of government annually to BWSR. The amount of information, the format and the timing of the reporting required will impact the actual cost to the local governments. The SONAR suggests that this cost is less than

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[29] SONAR at 6.
[30] SONAR at 6.
[31] SONAR at 6.
[32] SONAR at 6.

$25,000/year. This may be true for some of the local governments, however, others that have significant wetland activities under WCA could well be required to spend in excess of $25,000/year. When there is an increase in requirements for the local governments that is not compensated by the state the local government will generally increase local fees to cover the additional costs. The SONAR seems to be deficient in the assessment of what this reporting will cost local governments individually and collectively statewide. There needs to be acknowledgement that the recent passage of the Environment and Natural Resources Omnibus budget bill has reduced the natural resources block grant program that provides the state's funding share for implementation of these rules. In addition the state has proposed reducing the local government aids program as part of the budget balancing for the biennium. Even a minor increase in cost to local governments will be very difficult to accommodate when placed against other much higher priority programs. It would be appropriate to defer mandatory implementation of this provision until January of 2011 to allow the state and local economic recovery to begin to be realized.[33]

The Minnesota Association of Soil and Water Conservation Districts (MASWCD) expressed its concerns on this issue as follows:

However, we share the concerns of the Red River Watershed Management Board that costs to other LGUs, could exceed $25,000 per LGU. This would be at a time when cities and counties will likely be faced with reductions in funding from the state both through their WCA funding (through the Natural Resources Block Grant, NRBG), and their Local Government Aid (LGA).

For SWCDs, it will be difficult enough to maintain the current level of their wetland efforts in the face of budget cuts. Consequently, we would caution against any more prescriptive or cumbersome reporting requirements as both costly and impractical. At the state level, SWCDs will face budget cuts both through the NRBG as well as through their General Service Grants for operating costs. At the local level, districts will also face budget cuts from their counties and other LGUs that help financially support their efforts.[34]

The Board responded that the potential for increased costs would not reach the $25,000 threshold, stating:

The mandatory reporting requirement only affects those LGUs who are not currently reporting either as a requirement of the NRBG or voluntarily. For those LGUs who are not currently reporting, the increased cost will be minimal as the reporting consists of submitting a summary of the previous year's implementation activities and decisions (the current reporting form is 2 pages). LGUs that are properly implementing WCA will have this

[33] RRWMB Comment, at 2.
[34] MASWCD Comment, at 2.

information readily available. The information is not only necessary to improve the completeness of reported data, including data on the use of exemptions, but is also necessary for BWSR to perform its oversight responsibilities.

Other proposed changes to the rule do not alter how an application is reviewed or a decision is made, and no changes are proposed to LGU procedures that would result in a significant increase in cost. In fact, several changes are proposed that will reduce costs for LGUs and increase program efficiency.[35]

There is certain to be some increase in costs to LGUs arising from the reporting requirements in the rules. No commentator has quantified the actual costs to any particular LGU to demonstrate what financial impact will be caused by these rules. The provision cited as causing the increase in costs, reporting to the Board, was proposed to meet a legislative change in the WCA. The increase in costs to LGUs appears to be modest, and very likely to be below $25,000 for any one LGU.

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Board did not attempt to quantify costs to affected parties from not adopting the proposed rule. The Board indicated that the current situation results in “conflicts and inconsistencies between statute and rule.” The Board opined that retaining these inconsistencies would result in “confusion and uncertainty [that] would have negative consequences for landowners who would have difficulty in determining how to undertake projects that comply with state wetland regulatory requirements.”[36] The Board noted that LGUs would experience “similar difficulty in administering the rule and law that would have conflicts and inconsistencies.” The Board identified “Project delays and increased project costs … [as] the principal result of not implementing measures to improve state and federal coordination.”[37]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Board noted that its Wetland Mitigation Memorandum of Understanding entered into with the U.S. Army Corps of Engineers in May 2007 forms the basis for many of the wetland replacement requirements of the proposed rule. The Board indicated that the Corps is expected to make changes to its regulatory guidance that corresponds to the new WCA rule provisions.[38]

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[35] Board Comment, at 4.
[36] SONAR at 6.
[37] SONAR at 6.
[38] SONAR at 7.

Regarding differences between the proposed rules and existing federal regulation, the Board stated:

> However, much of the proposed rules cover areas that are not addressed by federal laws or regulations.
>
> The Corps/EPA Mitigation Rule was jointly released by the U.S. Environmental Protection Agency and Corps on March 31, 2008. A key component of this rule is to base wetland regulatory decisions, to the extent appropriate and practicable, on a watershed approach. According to guidance from the EPA, "mitigation decisions should be made from a watershed perspective in which the type and location of compensatory mitigation follows from an analytically-based watershed assessment to assure that the proposed compensation furthers watershed goals". This approach emphasizes analysis, planning, and determining the wetland regulatory decision is not just tied to the specific wetland proposed to be impacted, but on broader watershed needs.
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> BWSR believes increased focus on watershed based wetland management in these proposed rule amendments will benefit the wetland resources in Minnesota, will allow for improved coordination between WCA and other water quality and natural resource management programs, and foster improved state/federal wetland regulatory coordination. [39]

29. The Administrative Law Judge finds that the Board has demonstrated that it has adequately considered the probable costs of adopting the proposed rules, including the costs that would be borne by LGUs to report to the Board. The Board has adequately considered all the factors in the regulatory analysis required by Minn. Stat. § 14.131.

Performance Based Rules

30. The Administrative Procedure Act[40] requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[41]

31. In its SONAR, the Board described how it approached this obligation as follows:

> BWSR's objective with regards to wetland protection is to provide for resource conservation, public health and safety, and equitable use, while maintaining flexibility for local government and the public to enjoy and use the wetland resources consistent with state and federal law. Consistent

[39] SONAR at 7.
[40] Minn. Stat. § 14.131.
[41] Minn. Stat. § 14.002.

with this overall agency objective, the goals and considerations of this rule making are to:

- Clarify rule requirements;
- Simplify the rule where possible;
- Ensure the changes are implementable;
- Have a tangible result;
- Improve accountability;
- Limit impacts to local government workload;
- Limit unintended consequences;
- Balance public costs and benefits; and
- Be aware of stakeholder support.

These goals and considerations span the breadth of ecological, economic, and sociopolitical issues that relate to wetlands management and protection. BWSR, in undertaking our responsibilities in overseeing implementation of WCA, have (*sic*) always worked to balance the economic and social impacts with the biological requirements needed to conserve and protect Minnesota's wetland resources. Obtaining this balance is a challenge due to increased demands for regulation on the one hand, and demands for increased program simplicity and reduced costs associated with regulation on the other.

In developing the proposed rules, BWSR sought to provide local governments with increased decision-making flexibility and reduced administrative burden without compromising resource protection. The proposed rule amendments provide for consistent requirements in processing applications, increased support from the technical evaluation panel, and increased ability to place approval conditions to meet local needs and issues.

The agency has also sought to provide the regulated public increased flexibility in complying with regulatory requirements, again, without compromising resource protection. The proposed changes include increased flexibility in providing wetland replacement, increased ability to work with the LGU and TEP [Technical Evaluation Panel] in establishing appropriate project approval conditions, and increased ability to coordinate project planning that will comply with state and federal regulations. Overall, the proposed rule provides greater flexibility and accountability by moving towards a more outcome-based decision-making framework.[42]

32. The Board noted that the requirements of the Corps for application under the Clean Water Act, Section 404 program, constitute a significant barrier to performance-base rules. BWSR noted that it has promoted the voluntary development of local comprehensive wetland protection and management plans at the local level, seeking to:

[42] SONAR at 7-8.

- Generate an increased understanding of the importance of wetland resources to those affected by the rules;
- Integrate wetlands into daily local land use decisions rather than being as a separate land use decision;
- Encourage local governments to develop a WCA-consistent approach that addresses specific local needs and issues; and
- Improve the acceptance and compliance by the public with wetland protection goals of the WCA as a means of promoting conservation of these resources without additional increased regulation.[43]

33. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Consultation with the Commissioner of Finance

34. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government." Minnesota Management and Budget (MMB) is the successor agency to the Department of Finance.[44]

35. On January 20, 2009, the Board sent to the Commissioner of MMB the Governor's Office Proposed Rule and SONAR Form; the proposed rules; and the proposed SONAR. The MMB sent a response dated January 28, 2009. In its response the Department stated, "that BWSR has adequately analyzed and presented the potential costs to local units of government of the proposed rule and that the rule will have minimal fiscal impact on local units of government."[45]

36. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131.

Farming Operations

37. Under Minn. Stat. § 14.111, where an agency "adopts or repeals rules that affect farming operations," that agency must provide notice of the rulemaking to the Commissioner of Agriculture at least 30 days prior to publication of the rule change in the State Register. The Board noted that the proposed rule was designed to have minimal impact on agricultural activity, but that there would be some impact on farming operations. Based on this assessment, the Board sent a copy of the rule to the Commissioner of Agriculture on February 25, 2009. The Board also noted that the Department of Agriculture has participated as a member in the WCA Permanent Committee and that the Department of Agriculture is a member of the BWSR Board.[46]

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[43] SONAR at 8.
[44] Minnesota Management and Budget was formed from the merger of the Department of Finance and Department of Employee Relations. Laws of Minnesota 2008, Chapter 204.
[45] SONAR at 12.
[46] SONAR, at 12.

The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.111.

Compliance Costs to Small Businesses and Cities

38. Under Minn. Stat. § 14.127, the Board must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[47] The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[48]

39. The Board has determined that the cost of complying with the proposed rule in the first year after it takes effect will not exceed $25,000 for any one small city. The Board did not identify any probable costs are could be expected to arise from these rules.[49]

40. The Board concluded that most small businesses will experience only a minimal fiscal impact arising from these rule changes. This conclusion was based on the assessment that "Regulatory process reductions will be offset by increased wetland development and monitoring requirements for a minimal overall impact." With the exception of one class of business, the Board concluded that "The net affect is that no small business will experience an increased cost of more than $25,000 in the first year after the rules take affect."[50]

41. The only exception to the small business impact assessment was described by the Board as follows:

> One class of small business warrants special consideration. Wetland bank account holders businesses' are built around selling wetland replacement credits to allow landowners to meet their wetland replacement requirements under WCA and Section 404 of the U.S. Clean Water Act. The rule amendments propose to eliminate the current two credit system (new wetland credit — NWC and public value credit — PVC) to a single credit system which requires converting existing PVC to this new system. Existing non-wetland PVC will be converted to the new single - credit system at 90% of the amount of current NWCs.[51]

42. The Board set out reasons why this conversion factor is reasonable and included in the proposed rule. BWSR calculated the net effect of these changes and initially determined that up to seven banks may lose economic value from their wetland banks. The comparison of each bank's ratio of NWC to PVC, and sales volume resulted in six of these bank accounts "being extremely unlikely to experience a financial impact of more than $25,000 in the first year after the rules become

[47] Minn. Stat. § 14.127, subd. 1.
[48] Minn. Stat. § 14.127, subd. 2.
[49] SONAR at 13.
[50] SONAR at 12.
[51] SONAR at 12-13.

effective."[52] Regarding the remaining business, the Board considered the following additional factors:

- The rule places a greater emphasis on wetland banking as a means to provide wetland replacement credits. The increased demand should serve to increase the price that 'wetland bank account holders can receive for their credits, thereby offsetting any lost value by a conversion rate of less than 100%.
- The Corps currently regulates a significant majority of projects that impact wetlands in Minnesota. Their current guidance "converts" PVC at 25% (1 acre of PVC = 0.25 credits). The effect of dual regulation is that PVC in many cases is already available at a rate far below the 90% proposed by these rule amendments.
- The Minnesota economy is experiencing a recession that has been especially significant for land development businesses that are a major market for wetland banking credits.[53]

43. From its additional analysis, the Board concluded that "no wetland bank account holder should have a cost of $25,000 for complying with the rule."[54] As discussed in foregoing Findings, no individual statutory or home rule charter city with fewer than ten full-time employees was identified that would experience costs of $25,000 or more to comply with the proposed rules.

44. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 with regard to proposed revisions to the proposed rules.

Analysis of the Proposed Rules

General

45. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the Board's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

[52] SONAR at 13.
[53] SONAR at 13.
[54] SONAR at 13.

Discussion of Proposed Rule

Part by Part Analysis

8420.0100 Purpose

46. Rule part 8420.0100 sets out the background and goals of these rules and describes the regulatory system imposed by the WCA. The Board proposed modifications to the existing language, to be identified as subpart 1, and two new subparts, describing methods of implementing the WCA and the entities that administer the WCA.

47. Proposed subpart 3, describing administration, closes with the sentence, "The public is encouraged to contact their local government unit or soil and water conservation district for general information on wetlands and the interpretation of this chapter." The foregoing sentence is not rule language. To correct this defect, the rule should read, "Persons seeking general information on wetlands and the interpretation of this chapter may contact their local government unit or soil and water conservation district"

48. The approach of the rule is consistent with the statutory structure for applications and administration of the WCA. The Administrative Law Judge finds the rule part, with the suggested modification, is needed and reasonable. The new language does not result in a substantially different rule from that published in the *State Register*.

8420.0105 Scope

49. Rule part 8420.0105 describes the areas that are generally subject to restrictions on draining, excavation, and filling. The Board proposed modifications to the existing language, breaking it out into subparts, conforming language to changes throughout the rule, and clarifying that normal farming practices and incidental wetlands are not regulated under this rule.

50. Item A of subpart 2 clarifies that the rule does not prevent using "the bed of wetlands for pasture or cropland during dry periods" so long as "dikes, ditches, tile lines, or buildings are not constructed or improved and the agricultural use does not impact the wetlands." A commentator suggested that the term "impact" be deleted in Item A, maintaining that use of the word would likely result in a determination of an impact, even if the activity were to qualify as no-loss.

51. The Board explained that the definition of "impact" set out in part 8420.0111, subd. 31, provides a specific meaning under WCA, and that based on this definition, not all activities in a wetland are an impact.[55]

52. The proposed rule language replaces the existing phrase "does not result in the drainage of the wetlands." As the Board has explained, not all impacts are covered by the term "drainage." Use of the term "impact" appropriately conveys the

[55] Board Comment at 1.

Board's intent regarding the rule. The use of that term here will not affect no-loss or exempt activities, which are covered under other portions of this rule.

53. Item B of subpart 2 sets out the "normal farming practices that are not restricted by these rules. Josh Stromlund of Lake of the Woods County suggested that the rule language be modified to switch the order of farming and ranching to ensure the appropriate application of' this provision.[56] The Board agreed with the comment and modified the rule to read in pertinent part, "'Normal farming practices' means ranching, silvicultural, grazing, and farming activities." The rule as modified is needed and reasonable. The new language does not result in a substantially different rule from that published in the *State Register*.

8420.0111 Definitions

54. Proposed rule part 8420.0111 defines the terms used throughout the proposed rules. The definitions are largely drawn from the existing rule 8420.0110. Some of these definitions are amended and other definitions consist of entirely new language.

55. The Board has proposed the definition of agricultural land at subpart 6 of part 8420.0111 to read as follows:

> Subp. 6. **Agricultural land**. "Agricultural land" means land used for horticultural, row, close grown, pasture, or hayland crops; growing nursery stocks; animal feedlots; farmyards; or associated building sites and public and private drainage systems and field roads located on any of these lands. Agricultural land must be used principally for the cultivation or production of plants or farm animals and includes former agricultural land that is presently enrolled in conservation easements.

56. This definition is unchanged from the existing rule (8420.0110, subp. 4). The Minnesota Association of Soil and Water Conservation Districts (MASWCD) and Ron Harnack of the Red River Watershed Management Board (RRWMB) endorsed the retention of conservation easements in the definition and urged the inclusion of "conservation contracts" to include the "considerable agricultural land that does have conservation contracts (CRP & CCRP) that last for 10 to 15 years."[57] The Board agreed and proposed to change the last sentence in subpart 6 to read, "Agricultural land must be used principally for the cultivation or production of plants or farm animals and includes former agricultural land that is presently enrolled in a conservation program under contract or easements." [58]

57. The new language addresses the concern raised and treats similarly situated land similarly. The rule as modified is needed and reasonable. The new language does not result in a substantially different rule from that published in the *State Register*.

[56] Crookston Hearing Tr., at 51-52.
[57] RRWMB Comment.
[58] Board Comment at 2.

58. The Board has proposed at subpart 12 to define "best management practices" as "state-approved and published practices that are capable of preventing and minimizing degradation of surface water and groundwater." The Board noted that the "current definition is proposed to be modified to clarify that best management practices can be associated with all activities, not just those associated with draining, filling, or replacing wetlands."[59]

59. RRWMB urged the Board to endorse specific practices that would meet the definition of "best management practices[60] The Board responded that:

> There are a substantial number of best management practices that have varying levels of effectiveness depending on site conditions, practice goals, etc. BWSR cannot anticipate site conditions or individual project needs that will dictate what is an appropriate best management practice for a particular site and does not want to limit the availability of particular best management practices to project sponsors. A prescriptive rule would limit innovation in what is an evolving science. [61]

60. The Board's approach maximizes the flexibility of meeting the rule standards, which is a priority established by the Legislature in rulemaking. The absence of a listing of specific practices is not likely to unduly restrict what is determined to be available in the application process. The rule as proposed is needed and reasonable.

61. The Board has proposed the definition of degraded wetland at subpart 19 of part 8420.0111 to read as follows:

> Subp. 19. Degraded wetland. "Degraded wetland" means a wetland that provides minimal wetland function and value due to human activities such as drainage, diversion of watershed, filling, excavating, pollutant runoff, and vegetative or adjacent upland manipulation.

62. This definition is unchanged from the existing rule (8420.0110, subp. 13a). RRWMB suggested that the definition constituted an automatic definition of all wetlands in Minnesota as degraded. RRWMB suggested defining "vegetative or adjacent upland manipulation" or deleting that portion of the definition.[62]

63. The Board noted that the existing language, using examples of activities that could result in a wetland meeting the definition, is not prescriptive. The Board also noted that "Vegetative and adjacent upland manipulation is in fact one of the causes of wetland degradation."[63]

64. The definition in subpart 19 relates to the malfunctioning of the wetland arising from human activities. Providing examples of activities that could result in that malfunctioning does not constitute a defect in the proposed rule. Subpart 19 as proposed is needed and reasonable.

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[59] SONAR, at 16.
[60] Harnack Comment.
[61] Board Comment at 2.
[62] Harnack Comment.
[63] Board Comment at 2.

65. The Board has proposed at subpart 23 to define “drainage system” as “a system of ditch or tile, or both, to drain property, including laterals, improvements, and improvements of outlets.” This definition is unchanged from the existing rule (8420.0110, subp. 16). RRWMB suggested that Minn. Stat. Chapter 103E might contain a definition of this term and that the proposed definition might conflict with the statute.[64] MASWCD urged that the definition of “drainage system” in Minn. Stat. § 103E.005, subd. 12, be used.

66. The Board indicated that no conflict exists between the definition and Minnesota Statute § 103E, since as defined in the rule, “drainage system” includes both private and public systems. The subject of 103E, public drainage systems, is defined in the drainage exemption language contained in part 8420.0122, subp. 2.[65] Subpart 23 as proposed is needed and reasonable.

67. The Board has proposed at subpart 25 to define “fill” as “any solid material added to or redeposited in a wetland that would alter its cross-section or hydrological characteristics, obstruct flow patterns, change the wetland boundary, or convert the wetland to a nonwetland.” The definition describes specific things that are and are not fill within the meaning of the definition. This definition is essentially unchanged from the existing rule (8420.0110, subp. 18, where “it” is replaced by “fill”). RRWMB questioned whether underground utilities through a wetland fall within the definition. RRWMB suggested that such utilities be expressly listed in the “nonfill” group.[66] The Board responded that “Whether the solid material is minor or short-term is not relevant to determining if something meets the definition of fill. The no-loss provisions of part 8420.0415 and various exemptions contained in part 8420.0420 address … this concern.”[67] Subpart 25 is needed and reasonable as proposed.

68. Subparts 26, 27, and 36 defined the different areas of the state based on the percentage of wetlands in each. RRWMB suggested that each subpart have a reference to the map of the current counties within each area. BWSR agreed that such a change would improve clarity in the rule. The Board modified each subpart to reference part 8420.0117 (which contains that information). These subparts are needed and reasonable as modified. The new language does not constitute substantially different language from that published in the *State Register*.

69. Throughout the rules, the Board chose the term “may” to describe authority to act. This usage has been found to be defective throughout the rules. The ALJ has suggested item-by-item changes for each such defect. The ALJ also suggests that the Board correct these defects, where appropriate, by replacing “may” with the term “eligible.” The ALJ suggests that “eligible” be defined as “meaning the maximum extent to which an LGU or, where appropriate, delegated staff, can set the applicable parameter in the application of the Wetlands Conservation Act and these rules. The actual amount awarded is determined by the specific circumstances of each application, determined on a case-by-case basis, applying the standards set out in these rules.”

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[64] Harnack Comment.
[65] Board Comment at 2.
[66] Harnack Comment.
[67] Board Comment at 3.

70. The suggested definition supplants the permissive meaning of "may" with a defined standard which comports with the current practice, is capable of meaningful review, and does not afford unfettered discretion. Adding such a term and using it throughout the rules would be needed and reasonable. The suggested language would not constitute substantially different language from that published in the *State Register*.

8400.0200 Determining Local Government Unit; Duties.

71. Rule part 8420.0200 provides the mechanism for determining which LGU is responsible for carrying out particular actions, and what actions to carry out under the WCA. The Board proposed changes to the rule to conform the language to the WCA statutory changes enacted in 2003 and "to achieve a statewide standard for defining a local government unit (LGU)." The Board also proposed new language to clarify the process for delegating WCA authority from one local government to another.[68]

72. Subpart 1 of rule part 8420.0200 sets out the determination criteria where multiple LGUs are involved. The DNR suggested that state agencies should be required to coordinate with LGUs when acting on applications by others to work on State-owned land. The Board agreed with the suggestion and modified item C to "making decisions on" as matters that state agencies must coordinate with LGUs.[69] The rule as modified is needed and reasonable. The new language does not result in a substantially different rule from that published in the *State Register*.

73. Subpart 2 sets out the LGU duties, including its authority to delegate the initial decision-making authority to staff. Svoboda Ecological Resources, Ellingson Companies, and the Agricultural Drainage Management Coalition objected to the rule as allowing too much authority to staff.[70] The delegation authority is in the existing rule and not being changed in this proceeding. An appeal process from a staff decision is provided. The delegation language in subpart 2 is needed and reasonable.

74. Item F of subpart 2 states, "The local government unit may evaluate evidence for a no-loss, an exemption, or sequencing without making a decision." In its SONAR, the Board sets out its reasoning for this language, stating:

> Item F clarifies the LGU's ability to evaluate evidence and provide advice, without making a decision, on all wetland activities without the landowner going through the expense of developing an application. This language is proposed to be modified to not only apply to exemptions and is relocated from the current 8420.0210. Finally, the proposed practice is existing practice among LGUs to work with landowners on potential projects.[71]

75. The proposed language is inconsistent with the explanation. The proposed item F purports to authorize the LGU to take no action. The Board did not indicate that authorizing inaction was intended for this rule. This item has not been shown to be needed or reasonable.

[68] SONAR at 19.
[69] Board Reply, at 1.
[70] Public Exhibit 8.
[71] SONAR at 20.

76. To correct this defect, the Board must modify the language of the rule to reflect the authority of the LGU. The ALJ suggests that the Board modify item F to read, "In the absence of an application, the local government unit may evaluate evidence for a no-loss, an exemption, or sequencing upon the request of a landowner. The evaluation provided does not constitute a decision for the purposes of these rules." The suggested language clarifies the practice to be memorialized in the rules and the impact of following that practice. The suggested language is needed and reasonable and does not constitute substantially different language from that published in the *State Register*.

77. Item I of subpart 2 requires the LGU to "annually report information to the board regarding implementation of this chapter in a format and time period prescribed by the board." In its SONAR, the Board sets out its reasoning for this language, stating:

> Item I clarifies that LGUs are required to provide an annual report to BWSR. LGU data is necessary for BWSR to evaluate the effectiveness of the rule and of LGU's implementation of it. The proposed language states that BWSR may subject the LGU to penalty under subpart 3 for failure to comply with this requirement. This language also complies with the exemption reporting requirement of Minn. Stat. 103G.2241, subd. 11(d)..[72]

78. RRWWB suggested that the reporting requirement would increase costs to LGUs and recommended delaying implementation until January 2011.[73] The Association of Minnesota Counties (AMC) maintained that a reporting requirement would increase LGU workloads without returning a commensurate benefit. A number of Minnesota counties maintained that incorporating a mandatory reporting requirement would not be needed or reasonable because:

a) There will be an increase to the LGU's workload.

b) These requirements would not carry a penalty for non-compliance, thus be unenforceable.

c) These requirements may be less effective in rural or agricultural areas.

d) Landowners lack the technical expertise to be aware of that they are in a wetland.

e) Landowners would not be aware of these requirements.

f) It is contrary to the original intent of the Wetland Conservation Act (WCA).

g) The cost of implementation would not justify the benefits obtained.

h) The data collected would not be justifiable and consistent.

i) These requirements would require a statute change to implement since currently exempt projects would then require a permit.

[72] SONAR at 20.
[73] RRWWB Comment, at 2.

79. William Barton, Director of the Minnesota Division of the Izaak Walton League (IWL), urged adoption of a mandatory reporting requirement for exempt and no-loss activities, stating:

> Reporting via a simple form or thru a website by landowners is a reasonable approach that will not burden local government units. The Minnesota Division of the IWLA has taken a stronger position asking that all exemptions require a qualifying determination. (MN Division IWLA 2008) I agree that even this position is reasonable as the State of Minnesota is giving away a public resource with every exemption use.
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> * * *
>
> I believe the deletion of the rule requiring reporting of exempt wetland activities by the wetlands committee does not follow the intent of the 2008 Minn. Stat. 103G.2241 Subd. 11(d). The draft rules do not follow legislative direction on this subject and should be revised to include mandatory reporting of exemption use

80. The Minnesota Center for Environmental Advocacy (MCEA), noted that a significant problem in wetland management is the absence of data on wetland loss through exempt activities. MCEA described the efforts to obtain legislation on this issue, stating:

> During the 2007 legislative session, MCEA, the Izaak Walton League of America, the Sierra Club, and other conservation organizations lobbied for WCA exemption reporting requirements. MCEA and the Sierra Club were asked to support a bill that would amend WCA to insert certain language, and were convinced to do so after being assured that exemption reporting requirements would be included in the present rulemaking. .... The intent and purpose of the statutory change is to ensure that BWSR corrects a significant fault in the Rules that frustrates wetland gain and loss tracking efforts, that being the absence of means to collect data on the use of wetland exemptions by landowners, and the total acreage of wetlands acres that are being lost.[74]

81. MCEA disputed the contentions regarding the potential for increased costs to LGUs, stating:

> MCEA had thought that the argument about increased costs to BWSR had fallen by the wayside, after BWSR staff agreed that online reporting of exemption use would suffice for those with access to the internet. MCEA has also suggested paper mail-in forms on which to report exemption use should be made available at LGU offices, as an option for those without internet. Reporting exemptions in the convenient online or mail-in manner BWSR was proposing, or via other possible methods, does not represent an undue burden on citizens or LGUs. The LGUs would have the flexibility

[74] MCEA Comment, at 4.

to track and check exemptions if they chose, but would not be required to do so.[75]

82. The Sierra Club maintained that there is a "great need for accurate data on the use of exemptions." The Sierra Club supported a mandatory reporting requirement, stating:

> • The goal of the original Wetlands Conservation Act is to have no net loss of quantity or quality of wetlands in Minnesota. It is impossible to know the true status of loss of wetlands unless exempt activity is reported on.
>
> • The 2001-2003 Minnesota Wetland Report approved by the BWSR Board shows a net loss of 5821 acres. This is the last year for which a report is available. Since some Local Government Units (LGU) do require reporting of exemption use, some data is available. This limited data points to the need for gathering information on all uses of exemptions.
>
> • During the multi-year process to identify ideas for bettering wetland law, all parties, even those opposed to gathering exemption data, often pointed out the lack of credible loss data on which to base our proposals.[76]

83. MASWCD related its experience with reporting through the Board's eLink system. MASWCD expressed its satisfaction "that extending this reporting requirement to other LGUs will help provide BWSR with a more comprehensive set of data, and would better reflect the wetland activities across the state."[77] MASWCD only qualified its support for the proposed rule with concern about the potential costs, discussed above. For that reason, MASWCD opposed any more stringent reporting requirements on LGUs.

84. Proposed item I implements Minn. Stat. § 103G.2241, subd. 11(d), which states, "(d) The board shall develop rules that address the application and implementation of exemptions and that provide for estimates and reporting of exempt wetland impacts, including those in section 103G.2241, subdivisions 2, 6, and 9." The referenced subdivisions govern exempt impacts arising from drainage, utilities, public works, and de minimis activities. The plain language of the rule requires reporting wetland impacts that fall within the exemptions established by the WCA. The Board has shown that the proposed rule is needed to carry out this legislative directive. While the Board could have chosen a more inclusive mandatory reporting requirement, there is nothing in the statute which requires such an approach. The mechanism proposed is reasonable and does not impose undue costs on LGUs.

8420.0233 Other Local Government Unit Wetland Rules and Ordinances.

85. Proposed rule part 8420.0233 describes these rules and the WCA as establishing minimum standards. The rule provides that LGU's may require more procedures and more stringent wetland protection, but not less stringent or protective standards. The rule language is taken entirely from rule part 8420.0245, with no

[75] MCEA Comment, at 7.
[76] Sierra Club Comment, at 1.
[77] MASWCD Comment.

changes in the language of the rule.[78] The rule part is needed and reasonable as proposed.

8420.0240 Technical Evaluation Panel Procedures.

86. Rule part 8420.0240 sets out the composition, duties, and processes of the Technical Evaluation Panel (TEP) that each LGU must convene for assessing applications under the WCA. Each TEP must meet minimum requirements for knowledge and background. The requirements for members being from the Board, the local soil and water conservation district, and the LGU, are kept from the existing rule. The background requirement is updated in the proposed rule to cite more recent reference works in wetland classification.

87. Item C of part 8420.0240 requires the TEP to make technical findings and recommendations where requested by an applicant, an LGU, or a member of the panel. Additionally, certain projects are identified where the TEP must provide (even in the absence of a request) its recommendation. The Board proposed item D to read as follows:

> D. The panel may recommend to the local government unit approval, approval with changes or conditions, or denial of an application. When a technical evaluation panel assembles findings or makes a recommendation, the local government unit must consider the findings or recommendation of the panel in its approval or denial of an application. The panel shall make no findings or recommendations without at least one member having made an on-site inspection. Panel findings and recommendations must be documented and endorsed by a majority of the members. If the local government unit does not agree with the panel's findings and recommendation, the detailed reasons for the disagreement must be part of the local government unit's record of decision

88. The language in item D appears to leave the issuance of a report to the discretion of the TEP. This appears to be at odds with the required issuance language in item C. The ALJ recommends that the two items be made consistent by clarifying that the TEP must issue its report which may suggest one of the listed outcomes. The ALJ recommends that the first sentence of item D be changed to read: "The panel's recommendation to the local government unit may recommend approval, approval with changes or conditions, or denial of an application." The suggested language renders item C and D consistent with each other and removes the suggestion that the TEP has the discretion to issue no report. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the modification.

8420.0255 Local Government Unit Application and Decision Procedures.

89. Proposed rule part 8420.0255 establishes the process for receiving and evaluating applications under these rules. The rule part is divided into six subparts to

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[78] SONAR at 21.

address different stages of the decision process. Subpart 1 references the overall standards governing the application process that are set out in Minn. Stat. § 15.99.

90. Subpart 2 sets out the limitations for finding an application complete. As to finding an application incomplete, the subpart was proposed with the language: "The local government unit may determine an application incomplete when seasonal constraints prevent on-site review and verification of the application …."

91. MASWCD supported the wording of this provision, stating:

> Some SWCDs have struggled with how to comply with the requirements of Minnesota Statutes, section 15.99, in the face of seasonal constraints that prohibit on-site reviews. SWCDs and other LGUs do not always have the types of resources available to them that would allow them to make decisions without going out and actually seeing the site. However, in those cases, and under specific circumstances, the USACOE's 1987 manual does provide "off-site" procedures that would allow the LGU to make such a determination. We appreciate that the above wording provides flexibility and does not prevent approvals with conditions.[79]

92. Ellingson Companies, the Builders Association of Minnesota (BAM), Kent Rodelius of the Minnesota Land Improvement Contractors Association and the Agricultural Drainage Management Coalition, and other commentators proposed that the "seasonal constraints" sentence be deleted to avoid potentially permanent delays in decisions on applications.[80] Svoboda Ecological Resources suggested that a date certain be provided, no later than the start of the growing season. The Board responded to these suggestions by deleting the final two sentences in subpart 2, stating:

> The proposed language does not prevent or restrict a conditional approval, nor does it prevent approval of a delineation outside the growing season when conditions allow or off-site procedures can be utilized, as the intent is only to provide a more consistent process for LGUs to avoid a denial or automatic approval under Minnesota Statute § 15.99. However, BWSR is sensitive to the concerns raised regarding the possibility of unintended consequences of the proposed language. While there is a legitimate issue resulting from the conflict between the 87 Manual and Minnesota Statute § 15.99, the issue may be more appropriately dealt with through training and guidance.[81]

93. Removal of the "seasonal constraint" language removes a potential conflict with a statutory deadline. The tools available, such as conditional approval, to address applications where information cannot be independently verified are adequate. The suggested language is not substantially different from that published in the *State Register*. Subpart 2 is needed and reasonable with the modification.

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[79] MASWCD Comment, at 3.
[80] Public Exhibits 2 and 7; Grand Rapids Hearing Tr., at 88-89; St. Paul Hearing Tr., at 162-168 and 201-204.
[81] Board Comment, at 5-6.

94. Subpart 3 sets out the requirements for providing notice of applications. The DNR suggested that the rule be amended to clearly state that LGUs had discretion to provide notice of exempt and no-loss applications. The Board agreed that this discretion should be included in the rule and proposed an additional sentence be added that allows an LGU to issue notice of the exemption or no-loss application when the LGU "believes that input from those required to receive notice will be useful in determining whether an exemption or no-loss applies."[82]

95. The new language establishes an appropriate standard by which an LGU exercises discretion to provide additional notice. The rule as modified is needed and reasonable. The new language does not result in a substantially different rule from that published in the *State Register*.

96. Subpart 4 establishes the standards for an LGU decision on an application. The subpart requires that the LGU decision be based on the record established through the TEP process, with consideration of the comments received regarding the application. Svoboda Ecological Resources recommended that a requirement for consideration of comments in the subpart be deleted. The commentator maintained that only the TEP recommendation and the suggestions of other experts should be considered. Consideration of comments does not constitute a defect in the proposed subpart.

97. Included in subpart 4 is the language: "The local government unit may make on-site exemption and no-loss decisions if the decisions are noticed according to subpart 5 and project details are provided sufficient to document eligibility." The discretion afforded to the LGU is appropriately constrained by standards to avoid arbitrary application of the rule.

98. The final two sentences of the subpart state: "The local government unit's decision is valid for three years or as otherwise specified in the local government unit's decision. The local government unit may extend its decision with the concurrence of the technical evaluation panel" The effect of this language is to afford unfettered discretion to the LGU to set its own expiration date for the decision without regard for any particular standard.

99. In the SONAR, the Board described its rationale for this language as "Language regarding the validity of a decision (3 years) unless otherwise specified has been moved to this subpart from the current 8420.0220 and expanded to include all types of decisions for simplicity and consistency among LGUs."[83] The language from the existing rule (Minn. Rule 8420.0225) states: "D. The local government unit decision is valid for three years unless the technical evaluation panel determines that natural or artificial changes to the hydrology, vegetation, or soils of the area have been sufficient to alter the wetland boundary or type." The existing rule sets out a standard for when the LGU can exercise its discretion to extend the validity of its decision. That standard was omitted in the revision of the rule.

[82] Board Reply, at 1-2.
[83] SONAR at 23.

100. The language in subpart 4 that affords unfettered discretion constitutes a defect in the proposed rule. The Board has adequately supported the need for an LGU to extend its decision on an application, where circumstances warrant. The ALJ suggests that subpart 4 be amended to read, "The local government unit's decision is valid for three years or as otherwise specified in the local government unit's decision where the technical evaluation panel advises that a longer period is justified in accordance with the standards in these rules." The recommended language ensures that the LGU will make its extension decision based on standards in the WCA rules. The addition of an expiration date will ensure that LGU decisions are tethered to relevant conditions displayed in the affected wetland. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification.

8420.0265 Previously Approved Applications.

101. Proposed rule part 8420.0265 sets out the impact of a previously approved application on work to be performed. The rule part states in full: "Activities for which an application was approved may be completed under the laws, rules, conditions, and guidelines in effect when they were approved, provided the local government unit's approval is still valid." The SONAR describes the rationale for this rule as, "This clarification requires that the LGU approval to be valid for this part to apply to an activity."[84] The rule affords the applicant the ability to follow the standards in place when the application was granted, rather than more stringent subsequent standards. The rule part is needed and reasonable as proposed.

8420.0310 Wetland Boundary or Type Applications.

102. Proposed rule part 8420.0310 authorizes a landowner to apply to an LGU for a wetland type or boundary decision. The rule also describes the interrelation of different applications as:

> A wetland boundary or type application may be submitted independently or as part of a no-loss, exemption, sequencing, replacement plan, or banking application. When an independent wetland boundary or type application is approved, and the approval remains valid, it may be incorporated in a subsequent application for a no-loss, exemption, sequencing, replacement plan, or banking application.

103. The rule language has some standards for including an existing determination into a subsequent application. But the rule language appears to leave that incorporation to the exercise of discretion, while not identifying who can choose or under what conditions. This lack of clarity and absence of limits on discretion are defects in the proposed rule. To correct these defects, the ALJ recommends changing the last sentence to read:

> When an independent wetland boundary or type application is approved, and the approval remains valid, the applicant may incorporate the

[84] SONAR at 24.

approval in a subsequent application for a no-loss, exemption, sequencing, replacement plan, or banking application.

104. The suggested language assumes that the Board intended the applicant have the discretion to incorporate the existing decision into a later application. If the LGU was intended to have that authority, the language should be altered accordingly. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification.

8420.0315 No-Loss Applications.

105. Proposed rule part 8420.0315 authorizes a landowner to apply to an LGU for a no-loss determination. Item A of the proposed rule notes that landowners proceeding without such a determination could be subject to enforcement proceedings, if the property does not qualify for the no-loss exemption. While parts of the proposed language are not strictly rules, the intent of the Board is to inform the public of the opportunity for the landowner to obtain the "safe harbor" of a no-loss determination. The language is not so lacking in clarity as to result in a defect in the proposed rule.

106. Item B sets out the information requirements for no-loss applications as:

> B. The landowner applying for a no-loss is responsible for submitting the proof necessary to show qualification for the claim. The local government unit may require that a wetland delineation report or functional assessment be submitted if the local government unit determines that the report or assessment is necessary to make a decision on the no-loss application. This part also applies to applications requesting a decision on whether an activity or wetland falls within the scope of this chapter.

107. Svoboda Ecological Resources and Ellingson Companies maintained that landowners are already required to submit proof of qualifications and that any further requirement is unduly burdensome. The Board responded that the language clarifies "that the LGU may require a wetland delineation or functional assessment when needed to provide the baseline conditions necessary to ensure that temporary impacts are restored to pre-impact condition."[85] The Board noted that the required information depends on the specific category of no-loss that is requested and that for temporary impacts that information could include a wetland delineation or functional assessment. Since that information is covered by the first sentence of item B, the Board proposed to delete the second sentence of item B.

108. The suggested change does not affect the information that can be requested by an LGU. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification.

8420.0320 Exemption Applications.

109. Proposed rule part 8420.0320 authorizes a landowner to apply to an LGU for a no-loss determination. Item A of the proposed rule notes that landowners

[85] Board Comment, at 7.

proceeding without such a determination could be subject to enforcement proceedings, if the property does not qualify for the no-loss exemption. While parts of the proposed language are not strictly rules, the intent of the Board is to inform the public of the opportunity for the landowner to obtain the "safe harbor" of a no-loss determination. The language is not so lacking in clarity as to result in a defect in the proposed rule.

110. Numerous commentators discussed exemption reporting and the extent to which the proposed rule complies with Minn. Stat. § 103G.2241, subd. 11(d). MCEA and IWLA maintained that the proposed rule does not adequately comply with the statute absent a requirement that landowners report exempt activities to either BWSR or the LGU.[86] Other commentators opposed including a requirement in the rule due to, among other reasons, increased cost to LGUs, the inability of landowners to properly apply the rule, and that the requirement could have a negative affect on landowners conducting wetland restorations. The Board responded to these suggestions, stating:

> Several of the exemptions are activity based (such as certain elements of the Agricultural Activities and Drainage Exemptions), therefore it is not necessary for the landowner to know if the activity is occurring in a wetland. Requiring reporting of exemptions runs counter to this statutory construction and reasonable implementation of the exemptions.
>
> Furthermore, the quality and completeness of the data that would be collected under a reporting requirement does not warrant the expense. Identifying wetlands is not necessarily an easy task, nor is identifying which exemption applies to the activity or land. Errors in wetland identification, area affected, and exemption application would compromise the data. Furthermore, there is no way to compel landowners to report under current statutory authority. A reporting mechanism would still be hampered by a lack of certainty on how much exempt activity is not captured by the reporting requirement. Having data of uncertain provenance, of uncertain completeness, would lead to compromised policy debates built on false assumptions of exempt activity.
>
> The actions taken by BWSR both in this proposed rule, and outside of it will improve the data on all WCA activities, including exemptions. The required reporting from LGUs to BWSR is consistent with the statute and clear implementation of it. In addition, BWSR is proposing to conduct a study to generate estimates of exempt activity. This study would be designed to answer some of the questions raised when the statute was debated, with a lower impact on the public, LGUs and BWSR.[87]

111. The governing statute on this issue is Minn. Stat. § 103G.2241, subd. 11(d), which states, "The board shall develop rules that address the application and implementation of exemptions and that provide for estimates and reporting of exempt wetland impacts, including those in section 103G.2241, subdivisions 2, 6, and 9." The statute is silent as to who is to do the reporting. The statute does not specify the extent of the reporting. The language "estimates and reporting" implies that a mandatory

[86] MCEA Comment, at 13-14.
[87] Board Comment, at 8.

reporting provision by landowners was not intended by the Legislature. The Board has provided a reasoned approach that is consistent with the statutory language. The rule is needed and reasonable as proposed.

8420.0330 Replacement Plan Applications.

112. Proposed rule part 8420.0330 sets out the process for landowners to apply to the LGU to receive approval of a replacement plan. The replacement plan must be approved before conducting activities that impact a nonexempt wetland. The rule part is comprised of four subparts, detailing what must be submitted for approval of a replacement plan.

113. One commentator suggested consistent use of the terms “encourage” or “recommend” in subpart 2. The Board maintained that “the current terminology is reasonable and appropriate” and declined to change the rule language. While neither term is rule language, the Board’s intent in subpart 2 is clear and there is no defect in the subpart. Part 8420.0330 is needed and reasonable, as proposed.

8420.0335 Contractor’s Notification Responsibility.

114. Proposed rule part 8420.0335 prohibits a contractor from draining, excavating, or filling a wetland, absent obtaining a signed statement from the landowner or landowner’s agent that the wetland replacement plan required for the work has been obtained or that a replacement plan is not required. The contractor must also submit a copy of the statement to the appropriate LGU. Item C of the originally proposed rule purports to make violation of this rule a misdemeanor.

115. A commentator suggested that this requirement not apply to exemptions. The commentator maintained that notification by the contractor should be encouraged, but not required, in order to protect the landowner. The Board responded that the “provision is in the previous permanent rule and is required by Minnesota Statute § 1030.2212, regardless of the purpose of the wetland activity.”[88] The Board noted that the prior rule included language requiring that the Board supply the notification form. The Board amended the rule to add an item C to require the Board to supply that form. The notification requirements are needed and reasonable as modified.

116. Item D contains a provision purporting to make a violation of this rule part a criminal offense. Absent specific statutory authorization for an agency to define a crime by rule, state agencies lack the authority to render actions criminal violations. Only the Legislature can enact statutes which criminalize conduct.[89] Relettered item D exceeds the Board’s statutory authority which constitutes a defect in this rule part.

117. The ALJ suggests that item D be modified to read: “Work performed in violation of this part is made a misdemeanor by operation of Minn. Stat. § 103G.141.” The new language clarifies that the statute, not this rulemaking, renders the identified

[88] Board Comment, at 9.

[89] See Minn. Stat. § 609.02, subd.1. Crime. "Crime" means conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment, with or without a fine. Minn. Stat. § 609.02, subd. 3. Misdemeanor. "Misdemeanor" means a crime for which a sentence of not more than 90 days or a fine of not more than $1,000, or both, may be imposed.

conduct criminal. The suggested language is not substantially different from that published in the *State Register*. The item is needed and reasonable with the suggested modification.

8420.0410 No-Loss and Exemption Conditions.

118. Proposed rule part 8420.0410 requires that a person conducting an activity in a wetland under part 8420.0415 (no-loss) or part 8420.0420 (exemption) must avoid erosion and fish impacts and comply with other requirements, including best management practices. Svoboda Ecological Resources, Ellingson Companies, and the Agricultural Drainage Management Coalition suggested that agricultural activities be exempted from the erosion impact requirement.[90]

119. The Board responded that item A is existing language and also required by Minn. Stat. § 103G.2241, subd. 1.[91] The Board pointed out that "appropriate" erosion control measures are all that are being required by the rule. No defect has been shown in the proposed language. The rule part is needed and reasonable as proposed.

8420.0415 No-Loss Criteria.

120. Proposed rule part 8420.0415 describes "No-loss" as "no permanent loss of, or impact to, wetlands from an activity according to the criteria in this part." The rule part continues: "Activities that do not qualify for no-loss according to this part may be subject to the replacement requirements of this chapter." The rule then lists activities and impacts that qualify as no-loss.

121. Describing activities that "may be subject" suggests that the replacement requirements may not apply, rather than a project qualifying for no required replacement. This language is not sufficiently clear. To clarify the proposed rule, the ALJ recommends changing the sentence to read, "Activities that do not qualify for no-loss according to this part must be assessed under the replacement requirements of this chapter." The suggested language does not assume any outcome under the replacement requirements. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification.

122. MCEA objected to the manner in which no-loss is used throughout the rules.

> "No-loss" is a grammatically dubious term that BWSR has created and is meant to apply to actions that in fact cause no loss of wetland acres. The effect of reclassifying items now considered exempt impacts as "no-losses" is that they will not be tracked or reported on in the 'future, even if reporting of exemption use is required. An example of a current exemption that the Proposed Rules would reclassify to "no-loss," is the draining of any wetlands — even very old wetlands — created by a beaver dam. MCEA opposes this change, and the most experienced and respected

[90] Public Exhibit 8.
[91] Board Comment, at 9.

wetlands expert for the Department of Natural Resources likewise stated that wetland loss by removal of established beaver dams does in fact cause a loss of wetland area. This proposed change of BWSR' s actually runs counter to the legislature's direction to develop a rule that provides for estimates and reporting of exempt wetland impacts.[92]

123. The Board responded to the comment as follows:

When the removal of dams/debris placed by beaver only drains the new or increased wetland area caused by the beaver and does not reduce the condition of any pre-existing wetland, the removal is an activity that does not permanently drain a wetland. Counting every temporarily saturated area resulting from beaver activities that block culverts or drainage ditches as a permanent wetland impact is unreasonable and would provide a misleading picture of wetlands lost to exemptions. In fact, the language is more restrictive than the previous permanent rule as the wetland areas must be created "solely" by beaver activities in order to qualify for a no-loss under the proposed rule. The word "solely" was added as a result of a recommendation by the commenter during the rule development process. The applicability of this provision to wetland areas that have existed for significantly long periods of time, i.e. when the beaver dam has degraded to the point of becoming a permanent landscape feature, should be dealt with on a case-by-case basis in accordance with history and conditions of the site. Whether the activity is classified as an exemption or no-loss does not change the application of the provision.[93]

124. No defect has been shown in the proposed language. The rule part is needed and reasonable as proposed.

8420.0420 Exemption Standards.

125. Proposed rule part 8420.0420 sets out the standards under which impacts or activities can qualify as exempt from the replacement requirements of the WCA. Subpart 1 states:

A. Certain impacts may qualify for an exemption from replacement requirements. An impact is exempt from replacement if it qualifies for any one of the exemptions, even though it may be indicated as not exempt under another exemption. Persons proposing to conduct an exempt activity are encouraged to contact the local government unit to verify eligibility for an exemption and to evaluate alternatives to avoid or minimize wetland impacts. If the total amount of impact exceeds the amount allowed under the applicable exemption, the impact is not exempt and the entire amount of impact must be replaced

126. The foregoing is not sufficiently definite to constitute rule language. The ALJ suggests that the following language be used:

[92] MCEA Comment, at 9.
[93] Board Comment, at 10.

> A. An impact is exempt from replacement if it qualifies for any one of the listed exemptions. An impact is not disqualified where it is indicated as not exempt under a different exemption. Persons proposing to conduct an exempt activity may contact the local government unit to verify eligibility for an exemption and to evaluate alternatives to avoid or minimize wetland impacts. Where the total amount of impact exceeds the amount allowed under the applicable exemption, the impact is not exempt and the entire amount of impact must be replaced.

127. The suggested language clarifies what the rule is intended to require. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification..

128. Subpart 2 identifies activities for which no replacement plan is required. Svoboda Ecological Resources and other commentators stated that subpart 2, item G suggests there are applicable requirements in addition to the WCA rules that must be complied with in Minn. Stat. Chapters §§ 103A and 103B. This provision requires agreement by a group of agencies that have not yet met. The commentators urged that the agencies should be required to meet within a specific timeframe to iron out potential conflicts between the systems adopted under all these statutes. The Board responded that:

> Both Subp. 2, item G and Subp. 4 [regarding Federal approvals] are consistent with existing statute and rule. Amending the rule as proposed by the commenters would establish a direct conflict with statute.
>
> Concurrent with the development of these proposed rule changes, BWSR has met with the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) several times to identify opportunities for coordination between WCA and the federal farm program. These discussions included possible activities that could fall under subp. 2, item G. These meetings have identified significant program differences, but BWSR is committed to continue working with NRCS. It is the position of BWSR that the discussions need to progress with the administrator of the federal farm program prior to engaging the state agencies identified in the statute.
>
> Regarding Subp. 4, BWSR has demonstrated an ongoing commitment to coordinating WCA requirements with those of Clean Water Act, Section 404, and intends to begin working on this provision following the adoption of this proposed rule.[94]

129. MCEA suggested that the addition of item D to subpart 2 is unneeded. Item D states, "filling a wetland to accommodate wheeled booms on irrigation devices if the fill does not impede normal drainage." MCEA maintained that there is "no demonstrated need for this wholesale exemption of filling a wetland to accommodate booms from irrigation devices." MCEA expressed concern that no agency was tasked

[94] Board Comment, at 10-11.

with the responsibility to determine that these standards are being met.[95] Item D addresses a specific need in farming. There is no indication in the record that this activity will lead to significant loss of wetlands.

130. Subpart 5 relates to exemptions in restored wetlands. A commentator suggested that the use of the term "impacts" in item B was overbroad, as only drainage was applicable. The Board agreed with the suggestion and made that modification.[96] impact

131. Subpart 7 addresses the exemptions relating to forestry MCEA generally supported the new rule language, particularly regarding limiting exemptions when roads are used primarily for forestry. One commentator suggested adding "agricultural activities which do not qualify under the agricultural activities exemption", as newly developed and formerly agricultural lands are not addressed elsewhere. The Board was not clear on what was being suggested and declined to make that change.[97] The subpart is needed and reasonable as proposed.

132. Subpart 8 sets the standards for de minimis activities. MCEA generally supported the new rule language as comporting with the 2007 statutory amendments. One commentator suggested that the de minimis exemption should be based on wetland quality rather than wetland type. Another commentator stated the 20 square foot allowance under this exemption is unreasonably small and expensive to administer. The Board noted that the rule language is based on statutory requirements.[98] The rule is needed and reasonable as proposed.

8420.0522 Replacement Standards.

133. Proposed rule part 8420.0522 sets out the replacement standards for wetlands lost through impacts. Subpart 1 states:

> Subpart 1. General requirement. Wetland replacement must replace the public value of wetlands lost as a result of an impact. Replacement of wetland function and value may occur at more than one location. The public value of wetlands is based upon the functions of wetlands, including:
>
> > A. water quality, including filtering pollutants to surface water and groundwater, using nutrients that would otherwise pollute public waters, trapping sediments, protecting shoreline, and recharging groundwater;
> >
> > B. flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland;
> >
> > C. public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas;

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95 MCEA Comment, at 17.
96 Board Reply, at 4.
97 Board Comment, at 11.
98 Board Comment, at 11.

> D. commercial uses, including wild rice and cranberry growing and harvesting and aquaculture;
>
> E. fish, wildlife, and native plant habitats;
>
> F. low-flow augmentation; and
>
> G. other functions and public uses as identified in board-approved wetland evaluation methods. The board shall maintain a publicly available list of preapproved wetland evaluation methods.

134. The language in item G creates a mechanism for the Board to effectively amend its rule without engaging in rulemaking. This process violates the Administrative Procedures Act (Minn. Stat. Chapter 14) and constitutes a defect in these rules. To correct this defect, the ALJ suggests that the Board adopt the standards by which board approval will be given to the evaluation methods and note that approved methods will be publicly available from the Board. The ALJ suggests the following language:

> G. other functions and public uses as identified in wetland evaluation methods demonstrated to reasonably identify appropriate candidates for wetland replacement. No function or public use identified under this item will be applied prior to board approval. The board shall maintain a publicly available list of the methods that have been approved for wetland evaluation under the standards set out in this item.

135. The suggested language provides the Board with a means of assessing and approving wetland evaluation methods on a case-by-case basis that does not require rulemaking. The suggested language relies on the standards set out throughout the proposed rules and is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the suggested modification.

136. Subpart 2 sets out the standards for determining the amount of replacement when a wetland is partially drained. Jason McCarty, P.E., Director of Residential Development for Westwood Development Consultants (Westwood), asserted that the allocation of' credit at 10% or 25% of buffer areas is a hardship for landowners and that the amount of land that will have be set aside for replacement will increase significantly beyond no net loss.[99]

137. Subpart 3 sets out replacement ratios of 2.5 replacement credits for each acre of wetland impacted, except in greater than 80 percent areas and on agricultural land the replacement ratio is 1.5 replacement credits for each acre of wetland impacted. In addition to setting those ratios, subpart 1 allows for the replacement ratio to be reduced by 0.5:1 when the replacement consists of certain wetland bank or in-kind replacements.

138. Tamara Cameron, Superintendent of the Saint Paul District of the U.S. Army Corps of Engineers (Corps), suggested that the reduction in the replacement ratio by 0.5:1 if a “majority” of project specific replacement is in-kind could allow a percentage

[99] Public Exhibit 6.

as low as 51% to be considered in-kind. Concern was expressed that this proposed standard may depart from the Corps policy regarding replacement.[100]

139. The Board responded that:

> The proposed language resulted from significant concerns raised by stakeholders regarding the complicated nature of the process for determining replacement ratios, particularly in regards to in-kind. Projects that impact wetlands typically impact more than one wetland type or plant community due to wetland distribution or landscape gradients. When several wetland types require replacement the exact ratio of impact to replacement for each particular plant community is nearly impossible to achieve. Therefore, impacts and replacement must be compared to separately identify what amount of each plant community is in-kind and what amount is out-of-kind, with different replacement ratios applying to each. Then the breakdown for all plant communities are added together and the required replacement ratio can be determined. Since the required replacement ratio is dependent on the type of plant communities proposed (rather than a flat ratio with adjustments made up-front in the actions eligible for credit), modifications often need to be made to reach the newly calculated replacement ratio. Those modifications now require recalculation through the same process to again determine the ratio. Since the ratio is dependent on the replacement action, and the amount of replacement is dependent on the ratio, obvious complications result. A common effect of the above described process as required in the exempt rule was for applicants to ignore the requirement and skip to the higher replacement ratio. If a provision is too complicated to achieve its desired effect, the provision should be modified.
>
> The proposed language also is a result of concerns raised by BWSR and LGU staff concerning the achievement of specific ratios of plant communities in replacement wetlands. Rather than blending seed mixes across gradients and between plant communities to obtain a more natural and sustainable vegetative community, some applicants were creating abrupt changes between plant, communities in an attempt to obtain the exact percentage of each plant community impacted.
>
> BWSR is also aware of a strict interpretation by some LGUs regarding enforcement of the in-kind provision. That is to say that, if the exact proportion of impacted to replaced, plant communities were not obtained at the end of the monitoring period, that additional replacement would be required and the applicant would be in violation of WCA. While that is the literal reading of the language, it clearly is not the intent.
>
> The proposed language, allowing in-kind to be determined by a majority of wetland type/plant community, allows for a "big picture" focus on the entire wetland basin, where the majority of the type impacted would be the

[100] Public Exhibit 4.

majority type of the basin but other types could be restored or created as part of a wetland complex. This will improve diversity, increase the likelihood that restorations could be in-kind, and allow for plant communities to be matched to a greater degree to the replacement site.[101]

140. The need for replacement ratios arises from the demonstration that replacement wetlands fail to provide the full benefit of the wetland lost. The Board has affirmatively shown that its proposed ratios in subparts 2 and 3 are reasonable to meet the State policy of no net loss of wetlands by ensuring that replacements are conducted by function.

141. Subpart 4 lists the standards for replacements that qualify as in-kind replacement. Ms. Cameron stated that the proposed rule is not consistent with Corps policy or the Wetland Mitigation MOU, and as such undermines the goal of regulatory simplification. The Corps requested that two of the replacement items be dropped to render the rule consistent with Corps policy.[102] MCEA supported the Corps' position and urged that in-kind replacement not be expanded to different types.[103] Josh Stromlund, Land and Water Planning Director for Lake of the Woods County, recommended eliminating the in-kind requirement for wetland replacement, asserting that replacement of a wetland by a different type may result in greater public value than an in-kind replacement.[104]

142. The Board responded that the Wetland Mitigation MOU language regarding "in-kind" used in the exempt rule became the starting point for discussions concerning the permanent rule provision. Using the experience from the implementation of the exempt rule, BWSR staff, LGUs, and stakeholders identified several issues with the definition. Changes to the rule language were suggested and negotiated through several meetings with the St. Paul District of the Corps. The Board noted that concessions were made on both sides in an effort to achieve consistency.[105]

143. In its reply comment, the Board acceded to the suggestion that the two additional in-kind types not be adopted. The language in subpart 4 was changed to reflect this modification. The language removed for those types was placed in the provision governing out-of-kind replacement, originally proposed as subpart 3, in a new item C.[106] The new language also included some advisory language that difficult to replace wetlands, such as white cedar swamps or bogs, are typically not suitable for out-of-kind replacement. While the advisory language is not strictly a rule, the subpart is not sufficiently ambiguous to constitute a defect. The new language is not substantially different from that published in the *State Register*. Subpart 4 is needed and reasonable as modified.

144. Subpart 5 establishes the standards for replacement regarding ecological suitability and sustainability. A commentator suggested that Item C would be clearer if

[101] Board Comment, at 11-12.
[102] Public Exhibit 4.
[103] MCEA Comment, at 14.
[104] Stromlund Comment, at 3.
[105] Board Comment, at 13.
[106] Board Reply, at 1.

"without human intervention" was added to the description of "self-sustaining" in the subpart. The Board agreed and made that change.[107] The new language is not substantially different from that published in the *State Register*. Subpart 5 is needed and reasonable as modified.

145. Subpart 6 establishes an upland buffer requirement. BAM and Westwood asserted that requiring a standard upland buffer width of 25 and 50 feet lacks a scientific basis.[108] These commentators suggested that the buffer width should he determined by the LGU based on site conditions, as the appropriate buffer width is dependent on a variety of factors. Westwood performed a study that concluded "[m]ost reductions in volume, total solids, and total phosphorus occurred within the first five' [feet of the buffer]."[109] BAM argued that allowing average buffer widths results in arbitrary and capricious application of the rule to different landowners. BAM also argued that the buffer requirement constituted an unlawful taking of private property.

146. The DNR supported the proposed buffer width requirements, stating:

> We support the establishment of mandatory upland buffers in the proposed Rule and believe that the proposed buffer widths represent the minimum widths necessary to maintain wetland integrity. The goal of the WCA is to achieve no net loss and to increase the quantity, quality and biological diversity of the state's wetlands. Many wildlife species associated with wetlands also require adjacent uplands as part of their habitat needs, including waterfowl, wading birds, amphibians, some reptiles, and certain insects such as dragonflies and damselflies. Therefore, adjacent upland buffers are critical for maintaining wetland biological diversity, as required by the WCA. Depending on the wildlife species, or group of species considered, recommended buffer widths extend to over 5000 feet. The 25 and 50 foot widths proposed in the Rule reflect the practical realities of implementation but are minimally adequate for maintaining wetland-associated wildlife and should not be reduced further. There are numerous published studies regarding buffers. A recent, concise evaluation is attached to these comments (McElfish, J.M. Jr., R. L. Kihslinger, and S. S. Nichols. 2008. Planner's Guide to Wetland Buffers for Local Governments. Environmental Law Institute).

147. The Board responded that "the requirement will only apply in instances when a landowner 1) chooses to impact a wetland and replace it through project-specific replacement, or 2) chooses to restore a wetland and deposit the credits in the wetland bank for sale or later use. In these instances when an upland buffer is required, replacement credit is given for the buffer area."[110]

148. The Board relied upon its experience and scientific literature in concluding that "a rule requirement for a sufficient upland buffer … [is] the single most effective tool to increase the function, sustainability, and public value of replacement wetlands." The

[107] Board Reply, at 5.
[108] Public Exhibit 7; Grand Rapids Hearing Tr., at 84-85; St. Paul Hearing Tr., at 159-162.
[109] Public Exhibit 7, at 4.
[110] Board Comment, at 18.

Board maintained that "A tremendous amount of research and scientific literature exists to support the importance of and need for buffers around wetlands."[111] Specifically, the Board described its assessment for the proposed buffer distances as follows:

> In their "Planner's Guide to Wetland Buffers for Local Governments" (see SONAR for citation), the Environmental Law Institute (ELI) examined several hundred scientific studies and analyses of buffer performance and identified the following buffer distances that most effectively accomplish the functions of water quality and wildlife habitat: "*30 - >100 feet for sediment and phosphorous removal; 100 - > 160 feet for nitrogen removal; and 100 - 300 feet for wildlife protection*." Minnesota Statute § 103B.3355 requires that several wetland functions be considered in determining the public value of wetlands. Thus, a focus solely on one particular function is not consistent with statute. The challenge is to find a buffer width that will effectively provide some level of benefit to sustainability and to most functions in most circumstances, while being capable of being implemented on a programmatic basis and being reasonable from a land-use perspective.[112]

149. The Board has demonstrated that upland buffers have an accepted scientific basis in wetland restoration. The Board has fully supported both the need and reasonableness of its approach to upland buffers. The takings argument advanced by BAM requires that the impairment of property rights not have a scientifically grounded basis. The Board has demonstrated that its rule is based on the weight of scientific opinion regarding the width of wetland buffers. The Board accepted a suggestion to change item C to ensure that a variance from the buffer standard recommended by the TEP only be allowed if the functionality of the wetland is not jeopardized. The new language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable as modified.

150. Subpart 7 establishes a priority order of wetland replacement, by type. Different priories are established for the seven-county metropolitan area and for greater than 80 percent areas. An alternative is provided where "reasonable, practicable, and environmentally beneficial replacement opportunities are not available" in the applicable siting priorities.

151. A commentator questioned the overall preference for wetland banking, when on-site replacement is generally preferred. The Board responded that there is no stated preference for replacement through banking in the proposed rule. The Board noted that several provisions have the effect of making wetland banking easier and potentially more attractive than on-site project specific wetlands replacement. The Board indicated that staff experience and scientific literature have shown that on-site replacement results in lesser quality wetlands than banked wetlands. The Board considers this outcome a result of on-site replacement occurring through installations that are isolated from other wetlands or habitats and often have intrusions into the buffer or wetland boundary, resulting in negative effects and limited replacement functions.

[111] Board Comment, at 18.
[112] Board Comment, at 20 (emphasis in original).

The Board contrasted this with replacement through banking, which was characterized as resulting in larger wetlands with larger buffers and greater connectivity with other habitats. This difference was described by the Board as providing "multiple functional benefits; and increases efficiency of administration."[113]

152. MCEA objected to parts of the wetland replacement ratio formula, stating:

> Certain situations (impacts occurring in >80% areas or on agricultural lands, where the replacement wetlands are in the same bank service area, or where the project is in the same major watershed and in-kind) in the Proposed Rules permit replacement ratios as low as 1:1 The Proposed Rules also would increase the allowable wetland credit for replacement uplands from 0.25 of the wetland area required to 0.5. This is a fundamentally flawed proposal and conflicts impermissibly with the no-net-loss policy and purpose of WCA. The reason for the conflict is that when the acreage of destroyed wetlands is calculated, there is no fractional increase in the "impacted acres" to represent the ecological value of surrounding destroyed upland acres when they are present. Yet when the value of replacement wetland acres is calculated, up to 1/2 of the "replacement wetland" area can in fact be upland acres. As described in the rules, upland restoration can contribute substantially to the function of a restored wetland but uplands are not wetlands, and the counting of uplands should not be one-sided.
>
> The system in the Proposed Rules practically ensures that there will be net loss of Wetland acres through projects that count upland acres as fractional wetland acres, when those projects occur in 1:1 replacement situations. MCEA urges BWSR to keep the current 0.25 credit for uplands in 1:1 replacement situations.[114]

153. The analysis by MCEA contrasts with the analysis performed by Westwood, purporting to show that significantly more land is likely to be required by the operation of the buffer requirement. The Board has supported the buffer requirement, stating, "Providing a means to increase buffer credit is intended to create an incentive for landowners to provide more buffer than the minimum amount, particularly when those buffers will significantly improve wetland function and sustainability."[115] The rule strikes an appropriate balance between competing interests. The subpart is needed and reasonable as proposed

8420.0526 Actions Eligible for Credit.

154. Proposed rule part 8420.0526 sets out the standards for assessing replacement credit for various actions. Subpart 2 allows replacement credit for buffer areas. Westwood asserted that the allocation of' credit at 10% or 25% of buffer areas is a hardship for landowners and that the amount of land that will have to be set aside for

[113] Board Comment, at 21.
[114] MCEA Comment, at 17-18.
[115] SONAR, at 41.

replacement will increase significantly beyond no net loss.[116] The Corps expressed concern that the proposed rule provision that will allow up to 0.5:1 credit for upland buffer areas is in conflict with the Wetland Mitigation MOU and is not consistent with the St. Paul District Mitigation Policy published earlier this year. The Corps noted that uplands do not function as wetlands and therefore, the Corps maintained that upland buffers do not warrant the same level of credit as wetland restoration or enhancement.[117] Mr. Stromlund maintained that upland buffers are difficult to achieve in Northern Minnesota and adjacent wetlands should be allowed as credit instead.

155. The Board responded that a number of factors were taken into account regarding the proposed rule, including the vital importance of buffers to the successful replacement of wetlands. In arriving at the percentages of credit, the Board relied upon scientific literature, other information that is known to the Board, and staff experience, that large upland buffers around replacement sites are essential to sustainability, to enhancing wetland functions, and to replacing the public value lost to wetland impacts.[118]

156. The language of subpart 2 reads as follows:

> Subp. 2. Upland buffer areas. A. Replacement credit may be granted for ten percent of the buffer area for establishment or preservation of nonnative vegetation and 25 percent of the buffer area for establishment or preservation of native, noninvasive vegetation. Credit may be allowed for establishing upland buffer around existing high value wetlands adjacent to the replacement wetland when the minimum widths are maintained and the maximum buffer area is not exceeded

157. The use of may, even with the limiting language regarding scope in subpart 1, suggests undue discretion. To correct this, clarifying the rule with language regarding eligibility is appropriate. In addition, the Board agreed with a suggestion to include a cross-reference to the minimum width requirement. The suggested modification, with the Board's agreed-upon language reads as follows:

> Subp. 2. Upland buffer areas. A. Up to ten percent of the buffer area is eligible for replacement credit for establishment or preservation of nonnative vegetation and up to 25 percent of the buffer area is eligible for replacement credit for establishment or preservation of native, noninvasive vegetation. Establishing upland buffer around existing high value wetlands adjacent to the replacement wetland is eligible for credit only when the minimum widths provided in 8420.0522, subpart 6, are maintained and the maximum buffer area is not exceeded.

158. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

159. Subpart 3 sets out the credit available for restoration of completely drained or filled wetland areas. The proposed rule states:

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[116] Public Ex. 6.
[117] Public Ex. 4.
[118] Board Comment, at 22.

> Subp. 3. Restoration of completely drained or filled wetland areas. Restoration of both the natural hydrology regime and native, noninvasive vegetation on wetlands that have been completely drained or filled may receive replacement credit in an amount up to 100 percent of the wetland area hydrologically and vegetatively restored. The vegetation management plan must set a goal of restoring the historic native vegetation typical of the wetland being restored unless determined to be not ecologically feasible by the technical evaluation panel.

160. The language "may receive replacement credit" does not set out a standard for awarding credit and affords undue discretion. To correct this defect, the ALJ suggests the following language:

> Subp. 3. Restoration of completely drained or filled wetland areas. Restoration of both the natural hydrology regime and native, noninvasive vegetation on wetlands that have been completely drained or filled is eligible for replacement credit in an amount up to 100 percent of the wetland area hydrologically and vegetatively restored only where: a) the vegetation management plan sets a goal of restoring the historic native vegetation typical of the wetland being restored; and b) the technical evaluation panel determines that the plan is ecologically feasible.

161. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

162. Subpart 4 establishes credit for restoration of partially drained or filled wetland areas as follows:

> Subp. 4. Restoration of partially drained or filled wetland areas. Restoration of both the natural hydrology regime and native, noninvasive vegetation of wetlands that have been degraded by prior drainage, filling, or a diversion of the natural watershed may receive credit as follows:
>
> A. any wetland area substantially degraded by partial drainage or fill that was planted with annually seeded crops, was in a crop rotation seeded to pasture grasses or legumes, or was required to be set aside to receive price supports or equivalent payments in at least ten of the last 20 years before the date of application may receive credit based on the percent of the time the wetland area was annually seeded, in rotation, or set aside during the prior 20-year period; and
>
> B. all other wetland areas substantially degraded by partial drainage or fill may receive wetland credit of up to 50 percent of the wetland area restored.

163. A commentator suggested that the credit be proportional to the total wetland that was restored. The Board responded that item A allows for up to 100 percent credit to recognize that the impact of farming results in a more significant functional degradation of a wetland and thus the functional gain obtained through restoration is greater. The Board explained that item B does not allow as much credit for the partially drained area because the level of degradation is generally less and the

wetland is still providing wetland functions, just to a lesser degree. The Board explained the basis for this difference as follows:

> Also, partially drained wetland basins generally consist of 1) the outer part of the basin which is fully drained, and 2) the inner part of the basin which is partially drained. The fully drained area could receive up to 100% credit and Item B would only apply to the partially drained area. Thus, in effect, the basin as a whole is allocated credit proportional to the total wetland restored. This is accomplished through a process that is implementable and that provides clarity and certainty to landowners.[119]

164. The Board has shown that its intended result is needed and reasonable. But item A states that credit will be "based on the percent of the time the wetland area …" This language does not state a formula for awarding credit. In addition, the "may" language should be eliminated. The ALJ recommends the following language:

> Subp. 4. Restoration of partially drained or filled wetland areas. Restoration of both the natural hydrology regime and native, noninvasive vegetation of wetlands that have been degraded by prior drainage, filling, or a diversion of the natural watershed is eligible for credit as follows:
>
> A. any wetland area substantially degraded by partial drainage or fill that was planted with annually seeded crops, was in a crop rotation seeded to pasture grasses or legumes, or was required to be set aside to receive price supports or equivalent payments in at least ten of the last 20 years before the date of application, is eligible for credit in a percentage equivalent to the percent of the time the wetland area was annually seeded, in rotation, or set aside during the prior 20-year period; and
>
> B. all other wetland areas substantially degraded by partial drainage or fill are eligible for wetland credit of up to 50 percent of the wetland area restored.

165. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

166. Subpart 5 provides similar treatment for vegetative restoration of farmed wetlands as subpart 4 does for partially drained wetlands. Subpart 5 suffers from the same defect as that in subpart 4, that is, the formula for credit is not described and the term "may" is not sufficiently descriptive. To correct these defects, the ALJ suggests the following language:

> Subp. 5. Vegetative restoration of farmed wetlands. Reestablishment of permanent native, noninvasive vegetative cover on farmed wetland areas that have not been affected by prior drainage or filling is eligible for replacement credit for: A. up to 50 percent of the area restored for wetland areas that were planted with annually seeded crops, were in a crop rotation seeded to pasture grasses or legumes, or were required to be set aside to receive price supports or equivalent payments in at least ten of

[119] Board Comment at 23.

> the last 20 years before the date of application for a replacement or bank plan; or
>
> B. up to 90 percent of the area restored for wetland areas in bank service areas 2, 3, and 4 in a percentage equivalent to the percent of time the wetland areas were planted with annually seeded crops, were in a crop rotation seeded to pasture grasses or legumes, or were required to be set aside to receive price supports or equivalent payments during the 20-year period prior to the date of application for a replacement or bank plan.

167. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

168. Subpart 6 allows credit for wetlands previously restored through conservation easements. The rule states:

> Subp. 6. Protection of wetlands previously restored via conservation easements. Replacement credit may be granted for permanently protecting wetlands previously restored or created for conservation purposes under a contract or easement, when the contract or easement has expired and gives the landowner the right to drain or fill the wetland upon termination. The area receiving credit must meet the replacement wetland construction standards of part 8420.0528. Replacement credit may be granted for up to 75 percent of the area created or restored under the conservation contract or easement. Alternatively, credit may be allocated according to the other subparts in this part as applied prior to initiation of the contract or easement, when the applicant can document eligible credit yield to the satisfaction of the local government unit.

169. The language "credit may be granted" does not set out a standard for awarding credit and affords undue discretion. To correct this defect, the ALJ suggests the following language:

> Permanently protecting wetlands previously restored or created for conservation purposes under a contract or easement, when the contract or easement has expired and gives the landowner the right to drain or fill the wetland upon termination, is eligible for replacement credit where the area receiving credit meets the replacement wetland construction standards of part 8420.0528. The maximum replacement credit is 75 percent of the area created or restored under the conservation contract or easement. Alternatively, credit may be allocated according to the other subparts in this part as applied prior to initiation of the contract or easement, when the applicant can document eligible credit yield to the satisfaction of the local government unit.

170. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

171. Subpart 7 allows the award of replacement credit for wetlands created in upland areas in an amount up to 75 percent of the total wetland area created. Westwood asserted that replacement credit under this part should equal 100 percent,

since replacement wetlands are indistinguishable from naturally existing wetlands.[120] The Board disagreed with the assertion, and supported its position, stating:

> Created wetlands are allocated 75% wetlands in the proposed rule since, in general, created wetlands are of lower quality and reduced function than restored wetlands. A lower credit allocation creates an incentive for wetland restorations.[121]

172. In its reply, the Board modified item C to require treatment of runoff prior to that storm water reaching the wetland as a requirement for credit.[122] The modification supports the sustainability of the wetland and is needed and reasonable.

173. As with the foregoing subparts, the "may" language should be replaced with "is [are] eligible for". The suggested language and the Board's modification to item C are not substantially different from that published in the *State Register*. Subpart 7 is needed and reasonable with the modifications.

174. Subpart 8, item A provides in part that:, "Replacement credit may be granted for activities that restore and protect wetlands and adjacent areas that improve or directly contribute to the function and sustainability of exceptional natural resources. As with other rule provisions, modifying the language to state that the activities are "eligible for replacement credit" clarifies the extent of the rule. Item B provides that:

> B. Restoration and protection of calcareous fens, white cedar swamps, floodplain or riparian wetlands and upland buffers, habitat corridors with other important resources, or wetlands adjacent to designated trout waters are examples of potential qualifying activities. The allocation of credit under this subpart is determined by the local government unit with concurrence of the technical evaluation panel based on the actions proposed and the resulting contribution to the value and sustainability of the exceptional resource. Areas receiving credit must be protected by a permanent conservation easement, in a format prescribed by the board, that is granted to and accepted by the state.

175. While providing examples is helpful to the regulated public, the foregoing does not constitute rule language. Further, some of the language in item B is more appropriately located in item A. The ALJ suggests the following language for subpart 8:

> A. Restoration and protection of calcareous fens, white cedar swamps, floodplain or riparian wetlands and upland buffers, habitat corridors with other important resources, wetlands adjacent to designated trout waters; or other activities that restore and protect wetlands and adjacent areas that improve or directly contribute to the function and sustainability of exceptional natural resources are eligible for replacement credit. For purposes of this subpart, exceptional natural resources are:
>
> > [subitems as proposed]

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[120] Public Ex. 6.
[121] Board Comment, at 24.
[122] Board Reply, at 10.

B. The allocation of credit under this subpart is determined by the local government unit with concurrence of the technical evaluation panel based on the actions proposed and the resulting contribution to the value and sustainability of the exceptional resource. Areas receiving credit must be protected by a permanent conservation easement, in a format prescribed by the board, that is granted to and accepted by the state.

176. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

177. Subpart 9 sets out eligibility standards for replacement credit for public lands in greater than 80 percent areas. One commentator objected to this provision as allowing mitigation credit for already existing wetlands.[123] The Corps indicated that its policy allows wetland credit for preservation as appropriate on private lands as well as public lands.[124]

178. The Board described the provision as "a narrowly targeted option … It's hard to image its use."[125] The Board responded that making the listed actions eligible for credit was added "as a direct result of a statutory amendment made in 2008."[126] The Board noted that the proposed rule language was consistent with that of Minn. Stat. § 103G.2251.[127]

179. Subpart 9 appropriately follows the statutory provisions of Minn. Stat. § 103G.2251. But the rule uses the "replacement credit may be granted" formula that has been found to be defective. To correct the defect, the ALJ recommends that the first sentence of the rule be changed to read, "In greater than 80 percent areas, up to 12.5 percent of wetland areas and adjacent buffer owned by the state or a local unit of government and protected by a permanent conservation easement is eligible for replacement credit." Modifying the proposed rule in this way renders the rule needed and reasonable. This language does not make the rule substantially different from that published in the *State Register*.

8420.0544 Replacement for Public Transportation Projects.

180. The Board proposed to modify the language in existing rule part 8420.0544. These modifications include deleting some portions as no longer needed. The Minnesota Department of Transportation (MnDOT) disagreed with one proposed deletion, stating:

> The rationale given in the SONAR for deletion of this sentence (page 46, Item A, second to the last sentence) is that the language "pertains to applications submitted by April 1, 1996 and is no longer relevant." We disagree with this statement and believe that it is relevant for the following reasons.

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[123] Willmar Hearing Tr., at 54.
[124] Public Ex. 4.
[125] Willmar Hearing Tr., at 55.
[126] Board Comment, at 24.
[127] *Id*.

> The purpose of this sentence was to allow wetland bank credits from a wetland bank plan submitted by the cited date to be used without regard to the siting restrictions of current item A, subitem (6). The August 1993 version of Chapter 8420.0540, Subpart 5 allowed wetland credits for transportation projects to be replaced statewide without any restrictions. The June 1996 version of Chapter 8420.0540, Subpart 5 placed restrictions in less than 50% areas and the seven-county metropolitan area, however Subpart 3 included a statement that "the exceptions in Subpart 5 do not apply to replacement completed using wetland banking credits established by a person who submitted a complete banking application to a local government unit by April 1, 1996"
>
> Prior to 1996, the use of wetland bank credits, for transportation projects was not geographically restricted. Prior to 1996, MNDOT's Metro Division purchased a number of out state wetland bank credits for the purpose of using them to replace impacts in the seven-county metropolitan area. Mn/DOT follows the proper mitigation ratios for both BWSR and the Army Corps of Engineers wetland impacts. Mn/DOT invested funds in these pre April 1, 1996 credits and believes that we should be able to use those credits as we were allowed to do under the June 1996 Rule. Currently, Mn/DOT Metro District has a balance of 77 acres in Aitkin County and 20 acres in Waseca County that we would like to use up. Mn/DOT purchased these wetland credits from private bankers, so these credits are available in the wetland bank. If the language is not reinstated in the Rules, then we will not be able to use these credits.

181. MnDOT recommended that the rule language include: "Part 8420.0543, item A, subitem (6), does not apply to replacement completed using wetland banking credits established by an applicant who submitted a complete wetland banking application to a local government unit by April 1, 1996." MnDOT suggested that the language be placed in rule part 8420.0544, item B. MnDOT has shown that the proposed rule change will have an impact that has not been shown to be needed or reasonable. The Board agreed with the suggestion and proposed language to accomplish this treatment.[128] The new language renders the rule needed and reasonable. Retaining this language does not make the rule substantially different from that published in the *State Register*.

8420.0705 Establishing Wetland Bank Site.

182. Proposed rule part 8420.0705 establishes the eligibility and use standards for banking wetland restoration credits to be applied against wetland degradation in subsequent projects. Subpart 1 establishes eligibility standards, subpart 2 makes the LGU the responsible authority for administering banking in its jurisdiction, subpart 3 sets out application standards, subpart 4 establishes standards for combined banking and project-specific replacement, subpart 5 requires a perpetual easement as a precondition for banking, and subpart 6 sets time limits on construction.

[128] Board Reply, at 12.

183. MASWCD expressed the need to clarify that the easement is for access to enable BWSR monitoring and inspection and not to provide access to the public. The Board agreed with the suggestion and proposed that subpart 5 be modified to add the following language, "The access easement does not confer a right of access to the public." The Board proposed a similar change in all the places where "and access" appeared to ensure that the effect of the rule is clear.[129] The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

8420.0735 Monitoring and Corrective Actions.

184. Proposed rule part 8420.0735 governs monitoring and reporting of wetland bank sites for compliance with the wetland banking plan. A commentator suggest that the Board be allowed to vacate the conservation easement in place where the bank site requires corrective action but the credits have not been used. The Board agreed with the suggestion and proposed language that the Board "may vacate the conservation and access easement and close the account." In this instance, the rule language properly reflects the Board's discretion. The suggested language is not substantially different from that published in the *State Register*. The rule part is needed and reasonable with the modification.

8420.0800 Replacement Wetland Construction Certification.

185. Proposed rule part 8420.0800 is intended by the Board to clarify differences between the initial construction, and subsequent monitoring of a replacement wetland's hydrology, vegetation, and function. While parts of the rule are drawn from the monitoring portion of the existing rule (8420.0600 to 8420.0630), the Board provided new language affording a more formal review and approval of initial construction activities. Additionally, LGU certification of construction is incorporated into the rule.

186. Westwood noted that item F of subpart 2 refers to a "registered professional engineer." The commentator noted that "licensed professional engineer" is the correct terminology.[130] The Board agreed to change the rule in accordance with the suggestion.[131]

187. The new language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

8420.0810 Replacement Wetland Monitoring.

188. Proposed rule part 8420.0810 is taken from existing rules 8420.0600 through 8420.0630 that governed wetland replacement projects after the certification of construction. Subpart 1 of the proposed rule sets out the purpose of the monitoring. Subpart 2 clarifies the monitoring responsibilities for applicants and LGUs. Subpart 4

[129] Board Reply, at 12.
[130] Saint Paul Hearing Tr., at 127.
[131] Board Comment, at 25.

requires monitoring reports from the applicant to the LGU. Subpart 3 establishes the duration of the monitoring and reads as follows:

> Subp. 3. Duration of monitoring.
>
> A. Monitoring may, at the discretion of the local government unit, begin upon construction certification, but must begin no later than the first full growing season following construction certification. Monitoring must continue for five full growing seasons or until the local government unit determines, with the concurrence of the technical evaluation panel, that the replacement is successful, but in no case may the determination be made before the end of the third full growing season.
>
> B. If the goals of the approved plan have not been achieved after the fifth season of monitoring but, in the written opinion of the technical evaluation panel, may be achieved with more time, the local government unit may, through written notification of the applicant, extend the monitoring period for not more than an additional five growing seasons. The local government unit's notification of extension must specify the reasons for the extension and any corrective actions necessary to bring the replacement wetland into compliance with the approved plan.
>
> C. For project-specific replacement plans, if the local government unit determines that, at any time during the monitoring period and based on the recommendation of the technical evaluation panel, the goals of the approved replacement plan have not been achieved, and will not be achieved with more time, the local government unit must pursue one or more corrective actions identified in part 8420.0820, subpart 1.

189. BAM and RRWMB maintained that the proposed rule should not increase the length of monitoring from 3 years to 5 years.[132] The Board responded:

> The proposed rule does not increase the length of the monitoring period. Five years is the length of the monitoring period required in the previous permanent rule and the exempt rule. The proposed rule changes the terminology from "years" to "growing seasons" to improve clarity. The proposed rule also allows for an early end to monitoring (as early as 3 years) if the TEP concurs. A 5 year monitoring period is also consistent with the St Paul District of the Army Corps of Engineers policy.[133]

190. The Board has shown that its choice of monitoring period is needed and reasonable. The language affording discretion in subpart 3 is appropriately grounded in standards that render the rule clear and does not result in unfettered discretion. Part 8420.0810 is needed and reasonable as proposed.

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[132] Grand Rapids Hearing Tr., at 89-90; Saint Paul Hearing Tr., at 59-60 and 168-169.
[133] Board Comment, at 25-26.

8420.0900 Enforcement Procedures.

191. Proposed rule part 8420.0900 is taken from the existing rule part 8420.0290. As originally proposed, subpart 1 adds a "notice of potential violation" as a new enforcement mechanism. A commentator objected to this new type of enforcement procedure, due to the requirement to contact the LGU prior to it being issued. The Board agreed to change the rule in accordance with the suggestion. The Board deleted the reference to "notice of potential violation" from the rule.[134]

192. RRWMB stated that a number of provisions in this part refer to exemptions and these provisions will result in requiring a landowner to get certification, which is contrary to the intent of exemptions from the WCA.[135] The Board responded that:

> Including exemptions in the enforcement provisions is not a change from the current rule. The purpose for including exemptions, with all other WCA decisions in this part, is to specify the options available to landowners when they receive an enforcement order. Exemptions are legal activities when undertaken in accordance with the appropriate rule provisions. One purpose of enforcement is to ensure that an activity in a wetland meets these rule provisions. When a landowner is served 'with an enforcement order, one option is to apply for an exemption determination which, if the activity were eligible, would satisfy the order. This process assists in … ensuring the rule provisions are complied with.[136]

193. The references to exempt activity are in the nature of clarifying how enforcement proceeds when there is an exemption claim. The Board's approach to enforcement has been shown to be needed and reasonable. The suggested language is not substantially different from that published in the *State Register*. The subpart is needed and reasonable with the modification.

194. Subpart 3 sets out the provisions for restoration and replacement orders. MCEA maintained that enforcement officers have a role to play in determining whether restoration or replacement should be ordered and the rule removes these officers from that process, stating:

> In the current rules, replacement can be ordered only if the local SWCD, technical evaluation panel and enforcement authority all concur that restoration is not feasible or prudent. In effect, that gives the SWCD, TEP, and the enforcement authority equal opportunity to object to a proposal for replacement instead of restoration.
>
> * * *
>
> DNR's WEOs and COs have training and develop substantial experience in wetlands law and science. In addition, MCEA believes that there is a non-technical part of the decision to consider, which is whether the law will

[134] Board Comment, at 26.
[135] Saint Paul Hearing Tr., at 60-61.
[136] Board Comment, at 26.

continue to have deterrent power without a strong presumption that restoration will be required provided with back up by a person who has an enforcement mentality. The enforcement authority plays an essential role in determining whether it is prudent in an enforcement action to allow a variance from the presumed consequence of a violation, the presumed consequence being wetland restoration. This aspect of law enforcement, whereby enforcement retains limited discretion to allow a variation from the default penalty when deterrence would not be harmed and when other factors permit, is well within the traditional role of law enforcement.[137]

195. The Board responded that:

The determination of whether restoration or replacement is ordered is purely technical and should be the responsibility of the technical evaluation panel. Furthermore, the enforcement officer is not removed from the process, to the contrary, 8420.0249, Item C requires the technical evaluation panel to consult with the enforcement authority for violations of Minnesota Rules Chapter 8420. This process will ensure that technical considerations drive the restoration vs. replacement decision, with appropriate consultation with the enforcement authority.[138]

196. The Board has chosen to make the TEP the responsible entity to make restoration and replacement decisions. Consultation with the enforcement officer is retained in the rule. Nothing has been shown regarding the role of the enforcement officer that would render the Board's approach to be unreasonable. The Board has demonstrated that subpart 3 is needed and reasonable.

8420.0905 Appeals.

197. Proposed rule part 8420.0905 sets out the appeal provisions for the various levels of decisions and orders made under the WCA. RRWMB maintained that the Board should select a time frame for the LGU to make a decision when the result of an appeal is a remand to the LGU.[139] The Board noted that an LGU must make a decision within 60 days after remand under subpart 4, item C. The Board amended subpart 1 to identify the request for review period as 30 days. The Board explained that the change was needed to conform to the requirements of Minn. Stat. § 103G.2242.[140] The new language is not substantially different from that published in the *State Register*. The appeal provisions are needed and reasonable as modified.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter.

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[137] MCEA Comment, at 14-15.
[138] Board Comment, at 26.
[139] St. Paul Hearing Tr., at 63-64.
[140] Board Reply, at 13.

2. The Board has fulfilled the procedural requirements of Minnesota Statutes § 14.14 and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii), except as noted at Findings 116 and 134.

4. The Board has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii), except as noted at Findings 47, 75, 88, 100, 103, 121, 126, 157, 160, 164, 166, 169, and 173-175.

5. The amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the *State Register* do not result in rules which are substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated: June 19, 2009

/s/ Kathleen Sheehy for
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, and Minn. R. 1400.2240, subp. 4, this Report has been submitted to the Chief Administrative Law Judge for his review. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects, or if the Board does not elect to adopt the suggested actions, the statute requires the proposed rules be submitted to the Legislative Coordinating Commission and to the House of Representatives and the Senate policy committees with primary jurisdiction over state governmental operations for advice and comment.

If the Board chooses to follow the Chief Judge's recommended corrections and makes the suggested changes and/or others in order to cure the defects found, the agency must resubmit the rules for review by the Chief Judge. The Board may not adopt the rules until the Chief Judge reviews all changes and determines that all defects have been corrected.

If the Board chooses to submit the rules to the Legislative Coordinating Commission and the legislative committees for review, the agency must wait at least 60 days after its submission before adopting the rules.

After the rules have been adopted, the Office of Administrative Hearings will file the rules with the Secretary of State. The Board must give notice of the rules filing to all persons who requested that they be informed.